Judge Dav

125

SUPREME COURT OF THE UNITED STATES.

No. ~~272.~~ 187. 95.

MARIA B. KING, PLAINTIFF IN ERROR,

vs.

RICHARD ACKERMAN,

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK.

GIDEON, Printer, 511 Ninth Street, Washington, D. C.

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GIDEON, Print.

[Writ of Error.]

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America,

To the Judge of the Circuit Court of the United States for the Second Circuit, and in the Southern District of New York, GREETING:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said Circuit Court before you, between Maria B. King and Richard Ackerman, a manifest error hath happened to the great damage of the said Maria B. King,
[2] as by her complaint appears. And it being fit that the error, if any there *hath* been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the proceedings and record aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have
[3] the same at Washington on the first Monday in December, in the year of our Lord one thousand eight hundred and sixty, in the said Supreme Court, to be then and there held, that the proceedings and record aforesaid, being inspected, the said Supreme court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

[SEAL.] Witness the Hon. Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this first
[4] Monday in the year of our Lord one thousand eight hundred and fifty-nine, and of the Independence of the United States the eighty-fourth.

KENNETH G. WHITE,
Clerk.

The return to the within writ of error appears in certain schedules hereto annexed.

KENNETH G. WHITE,
Clerk.

[Bond.]

Circuit Court of the United States for the Second Circuit, and Southern District of New York:

MARIA B. KING,
vs.
RICHARD ACKERMAN. } In Error.

Know all men by these presents, that I, John B. Ireland, of the City, County and State of New York, am held and firmly bound unto

[Writ of Error.]

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America,

To the Judge of the Circuit Court of the United States for the Second Circuit, and in the Southern District of New York, GREETING:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said Circuit Court before you, between Maria B. King and Richard Ackerman, a manifest error hath happened to the great damage of the said Maria B. King,
[2] as by her complaint appears. And it being fit that the error, if any there *hath* been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the proceedings and record aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have
[3] the same at Washington on the first Monday in December, in the year of our Lord one thousand eight hundred and sixty, in the said Supreme Court, to be then and there held, that the proceedings and record aforesaid, being inspected, the said Supreme court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

[SEAL.] Witness the Hon. Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this first
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KENNETH G. WHITE,
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The return to the within writ of error appears in certain schedules hereto annexed.

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Clerk.

[Bond.]

Circuit Court of the United States for the Second Circuit, and Southern District of New York:

MARIA B. KING,
vs.
RICHARD ACKERMAN. } In Error.

Know all men by these presents, that I, John B. Ireland, of the City, County and State of New York, am held and firmly bound unto

[5] the above-named Richard Ackerman in the sum of two hundred dollars, to be paid to the said Richard Ackerman, his executors or administrators, to which payment well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents. Sealed with my seal, and dated this first day of November, in the year of our Lord one thousand eight hundred and sixty.

Whereas, the above-named Maria B. King, hath prosecuted a writ of error to the Supreme Court of the United States to reverse [6] the judgment rendered in the above-entitled suit by the Circuit Court of the United States for the Second Circuit, and Southern District of New York,

Now, therefore, the condition of this obligation is such, that if the above-named Maria B. King shall prosecute her said writ of error to effect, and answer all damages and costs if she shall fail to make good her plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN B. IRELAND. [L. S.]

Sealed and delivered in the presence of,

[7] R. E. STILWELL,
U. S. Commissioner.

[Citation to Defendant in Error.]

United States of America, *ss:*

To Richard Ackerman,

GREETING:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error [8] filed in the clerk's office of the Circuit Court of the United States for the Second Circuit and Southern District of New York, wherein Maria B. King is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice not be done to the parties in that behalf.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, the first day of November, in the year of our Lord one thousand eight hundred and sixty.

[9] S. NELSON.

[Judgment for Defendant.]

United States Circuit Court for the Southern District of New York.

Pleas before the Circuit Court of the United States for the Southern District of New York, held at the City Hall in the city

of New York, of the Term of April, in the year of our Lord one thousand eight hundred and fifty-eight.

[10] *Present*—The Hon. SAMUEL NELSON, Judge.

Southern District of New York, *ss.*

Be it remembered, that on the first Monday of April, in this same Term of April, before the Circuit Court of the United States for the Southern District of New York, held at the City Hall, in the City of New York, comes Maria B. King, by John B. Ireland, her attorney, and brings into the said Court, before the aforesaid Judge thereof, now here, his certain bill against Richard Ackerman, being [11] in custody, &c., in a plea of *ejectment*, which said bill follows in these words, that is to say:

Southern District of New York, *ss:* }
City and County of New York. }

Maria B. King, who is a citizen of the State of New Jersey, plaintiff in this action, by John B. Ireland, her attorney, complains of Richard Ackerman, who is a citizen of the State of New York, being in custody, &c., for that whereas the said Maria B. King, on [12] the first day of March, in the year of our Lord *one* thousand eight hundred and fifty-eight, was possessed of one undivided third part of six lots of ground situate in the village of Harlem, in the Twelfth Ward of the said City and County of New York, and being known as part of a certain estate or property formerly belonging to Laurence Benson, now deceased, described and distinguished as the "Homestead," but now more particularly known by the [13] following bounds and descriptions, to wit: commencing at the south-westerly corner of One Hundred and Twenty-ninth street and Fourth avenue, and running thence westerly along the southerly line of said One Hundred and Twenty-ninth street one hundred and fifty feet, thence southerly and parallel with said Fourth avenue one hundred feet, thence easterly and parallel with said One Hundred and Twenty-ninth street one hundred and fifty feet to the westerly line of said Fourth avenue, thence northerly along the line of said [14] avenue one hundred feet to the place of beginning, and containing six lots of ground, of which said premises the said Maria B. King claims an undivided third part in fee, and that she, the said Maria B. King, being so possessed thereof, the said Richard Ackerman afterwards, to wit: On the twenty-second day of April, in the year of our Lord, 1858, entered into the said premises, and ejected the said Maria B. King therefrom, and unjustly withholds [15] from the said Maria B. King the possession *thereof*, to the damage of the said Maria B. King of ten thousand dollars, and therefore she brings suit.

And the said Richard Ackerman, defendant in this suit, by Edgar Ketcham, his attorney, comes and defends the force and

injury, when, &c., and says that he is not guilty of the supposed trespasses above laid to his charge, or any or either of them, or any
[16] part thereof in manner and form as the said plaintiff *hath* above thereof complained against him, or of unlawfully withholding the said premises claimed by the plaintiffs as alleged in the said declaration; and of this the said defendant puts himself upon the country, &c., and the said Maria B. King doth the like.

Therefore the issue above joined is ordered by the said Court to be tried at the said Circuit Court, appointed to be held at the City
[17] Hall, in and for the said City and County of New York, on the first Monday of September next, in the year aforesaid.

And because the aforesaid issue, so as above joined in this cause between the parties aforesaid, was not tried at the Circuit Court held at the time and place last aforesaid, in and for the said city and county aforesaid, therefore the process between the parties aforesaid is continued until the Circuit Court appointed to be held
[18] at the City Hall in *the* City of New York, in and for the said city and county, on the first Monday of April, in the year one thousand eight hundred and fifty-nine.

And now at this day, that is to say, on the first Monday of April, in the said Term of April, in the year last aforesaid, before the said Circuit Court of the United States for the Southern District of
[19] New York, at the City Hall aforesaid, before the said Justice of the said Court, *came* the parties aforesaid, by their attorneys aforesaid, and the Marshal of the United States now here returns a panel of jurors summoned by him to try the aforesaid issue, so as above joined, and the jury aforesaid being called, also came, who, to speak the truth of the matters aforesaid, being chosen, tried, and sworn, say upon their oaths, that the said defendant is not
[20] guilty of *the* matters within laid to his charge, in manner and form as the said plaintiff hath within complained against him.

And because the said Court, before the aforesaid Justice thereof, now here, is not yet advised what judgment to give of and upon the premises, therefore the process thereof is continued between the parties aforesaid of the plea aforesaid, in this same Court, before
[21] the Justice thereof, until the first *Tuesday* of September, in the year one thousand eight hundred and sixty, at the City Hall, in the City of New York aforesaid, and the same day is given to the parties aforesaid, at the same place, to hear the judgment of the said Court thereupon, at which said last-mentioned day, before the Justice aforesaid, at the place last aforesaid, came the parties
[22] aforesaid, by their *respective* attorneys aforesaid, and thereupon all and singular the premises being seen, and by the said Court, before the Justices thereof, now here fully understood, and mature deliberation being thereupon had, it is considered by the same Court that the plaintiff take nothing by her said bill, but that she is in

[23] mercy, &c. And it is further considered that the *said* defendant do recover his costs against the said plaintiff, by him paid, laid out and expended in and about his defence in this behalf, by the Court now here assessed, at twenty-eight dollars and seventy-five cents.

And the plaintiff be in mercy, &c.

Judgment signed this 1st November, 1860.

R. E. STILWELL,
Dep. Clerk.

[Plaintiff's Bill of Exceptions.]

United States Circuit Court for the Southern District of New York:

MARIA B. KING,
vs.
RICHARD ACKERMAN.

[24] Afterwards, to wit, at a Circuit Court of the United States, held at the City Hall, in the City of New York, in the City and County of New York, on the twentieth day of May, in the year one thousand eight hundred and fifty-nine, before the Hon. Samuel Nelson, Circuit Judge, appointed to hold the said Circuit Court for the Second Circuit of the United States, according to the [25] form of the statute in such case made and provided, the aforesaid issue *so* joined between *the* said parties as aforesaid, came on to be tried by a jury of the City and County of New York aforesaid, for that purpose duly empanelled, twelve good and lawful men of said city and county, at which day came there as well the said plaintiff as the said defendant, by their respective attorneys aforesaid, and the jurors of the jury aforesaid, empanelled to try the said issue, being called, also came, and were then and there in due man- [26] ner chosen and *sworn* to try the same issue, and upon the trial of that issue the counsel *for* the said plaintiff, to maintain and prove the said issue, on his part, offered in evidence the following admitted facts: "That Laurence Benson, at the time of executing his will, hereinafter mentioned, and at his death, was seized of the premises in question. He died on the fifth day of November, 1822, at the [27] age of sixty-five years. That Maria, his wife, died in the year 1829, *at* the age of sixty years. That Laurence Benson left him surviving as his sole heirs-at-law, a son, Benjamin L. Benson, and the children of Susan Benson, daughter *of* the said Laurence Benson, and her husband, the Rev. Dr. Philip Milledoler, who were born of them during lawful wedlock, to wit: Maria B. King, Susan Ann Brett, wife of Martin W. Brett, and Cornelia Graham, wife of [28] John H. Graham, *who* are the sole heiresses-at-law of the said Susan Milledoler, and with said Benjamin L. Benson, sole heirs-at-law of the said Laurence Benson.

That the said plaintiff, Maria B. King, claims title to one equal

undivided sixth part of the premises in question, as one of the before-mentioned heiresses of Laurence Benson. *That* said plaintiff
[29] was, at the commencement of this suit, and now is, a resident of the State of New *Jersey*.

The last will of Laurence Benson, deceased, executed in due form of law, to pass real estate, the execution and due proof of which is admitted, is in the following words:

In the name of God, amen.

I, Laurence Benson, of Harlem, Ninth Ward of the City and County of New York, yeoman, being of sound mind, do make and order this my last will and testament, and do appoint and ordain
[30] Maria Benson, my *loving* wife, executrix, George C. Duryee, and Benjamin P. Benson, executors of this my last will and testament, and do hereby revoke and disannul all and former wills, testaments, and executors whatsoever by me made, acknowledging this to be my last will and testament.

In the first place, I give and bequeath to my son, Benjamin L. Benson, all that estate now occupied by George Williams, to do and dispose of as he may think proper.

I *also* give and bequeath to my son, Benjamin L. Benson,
[31] the homestead where I now live, situated on Harlem *River*.

Secondly, my will and intention is, that my son, Benjamin L. Benson, do give unto my grandchildren, after the decease of my wife, the sum of fifteen hundred dollars.

Thirdly, the income of these legacies, and also of my estate, real
[32] and personal, I give unto my loving wife, Maria Benson, during her widowhood, *to* do and dispose of as she may think proper.

In testimony of which, I have hereunto affixed my hand and seal, in the year of our Lord one thousand eight hundred and twenty-one, on the thirteenth day of February, and in the *forty*-sixth year of the Independence of the United States.

LAURENCE BENSON, [L. S.]

John P. Waldren,
Grove Bend Waldren,
John Goley,
} Witnesses.

The lands in question in this action are part of the premises
[33] described in the *said* will as lands or premises, forming part of an estate or [property formerly belonging to said Laurence Benson, now deceased, and known as the "Homestead," by the following bounds and descriptions, to wit: Situate, lying, and being in the Twelfth Ward of the City of New York, and bounded as follows: commencing at the south-westerly corner of One Hundred and Twenty-ninth street and Fourth avenue, and running thence
[34] westerly along the southerly line of said One Hundred and Twenty-ninth street one hundred and fifty feet, thence southerly and parallel with said Fourth avenue one hundred feet, thence

easterly and parallel with said One Hundred and Twenty-ninth street one hundred and fifty feet to the westerly line of said Fourth avenue, thence northerly along the line of said avenue one hundred feet, to the place of beginning, and containing six lots of ground.

[35] It is further admitted, that by sundry conveyances in fee by Benjamin L. Benson, executed subsequently *to* his father's death, all the lands in question in this action was conveyed to the defendant.

It is also admitted that the defendant entered into possession of the land in controversy under the title so granted by said Benjamin L. Benson, and has ever since continued and now is in possession

[36] thereof; and it is *further* admitted, that the plaintiff entered upon said premises and demanded possession of *the* same from the defendant before the commencement of this action, and that the defendant refused to give her possession of the same, or any part thereof.

It is admitted that *said* Benjamin L. Benson died on or about the 4th day of October, 1852.

The Rev. Philip Milledoler, and Susan Benson, daughter of Lau-

[37] rence Benson, were married on or *about* the 29th day of March, 1796.

Mrs. Susan Milledoler died on or about the 29th day of July, 1815, leaving her surviving, as her sole children and heiresses-at-law, Maria B. King, Susan Ann Brett, and Cornelia Graham, and that the plaintiff in this action, Maria B. King, is one of said children.

And the counsel for the said Maria B. King, the plaintiff, offered

[38] to prove *that* at the time of the making of *the* will, and from thence forward until the death of the testator, Laurence Benson, the Williams lot mentioned in the said will was worth the sum of five thousand dollars.

To the admission of which evidence the counsel learned in the law, of the said Richard Ackerman, did then and there object, and insist before the said Circuit Judge that the same ought not to be

[39] admitted or allowed, and the counsel for the said *Maria* B. King, did then and there, on the behalf of the said Maria B. King, insist *that* the matters so offered to be proved and given in evidence on the part of the said Maria B. King, as aforesaid, were sufficient, and ought to be admitted and allowed as evidence, to entitle the said Maria B. King to a verdict in this cause; and the said Circuit Judge did then and there decide that the same was inadmis-

[40] sible, and excluded the same, to which ruling and decision *the* plaintiff, by her counsel, did then and there, in due time and due form of law, on behalf of the said Maria B. King, except.

And the said *Circuit* Judge did then and there declare and deliver his opinion to the jury aforesaid, that the said several matters so

produced and given in evidence on the part of the plaintiff, were not sufficient to entitle the plaintiff to recover of and from the defendant the land claimed in the declaration in this action, or any
[41] part thereof, and thereupon *instructed* and directed the said jury to render a verdict for the defendant in the said action, whereupon the said counsel for the said plaintiff, did then and there, on behalf of the said plaintiff, except to the aforesaid opinion of the *said* Circuit Judge, and insisted that upon the facts so admitted and offered in evidence, the plaintiff was entitled to recover the land
[42] claimed by her in the declaration aforesaid, or some *part* or portion thereof, and the said Circuit Judge, under the charge and with the directions aforesaid, left the aforesaid issue and the evidence so given on the trial thereof as aforesaid, to the said jury, and the jury aforesaid then and there gave their verdict for the said defendant; and inasmuch as the said several matters so proposed and given in evidence, *and* so offered and proposed to be given in evidence on the part of the said plaintiff, and by her counsel afore-
[43] said, proposed, offered, and *insisted* on to maintain the action aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the said plaintiff did then and there prepare and propose their aforesaid exceptions to the opinion of the said Circuit Judge, and requested him to put his seal to this bill of exceptions containing the said several matters so produced and given in
[44] evidence on the part of the said plaintiff as aforesaid, and also the several *matters* proposed and offered to be given in evidence as aforesaid, according to the form of the statute in such case made and provided; and thereupon the said Judge of the said Circuit Court of the United States, at the request of the said counsel for the said plaintiff, did put his seal to this bill of exceptions pursuant to the aforesaid statute in such case made and provided,
[45] on the first day of November, in the year of our Lord, one *thousand* eight hundred and sixty.

S. NELSON.

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SUPREME COURT

OF THE UNITED STATES.

MARIA B. KING,
Appellant,

vs.

RICHARD ACKERMAN,
Respondent.

On Appeal from the Judgment of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

POINTS AND ARGUMENT

ON THE PART OF THE RESPONDENT,

WITH A COPY OF THE WILL OF L. BENSON, AND THE OPINION OF CHANCELLOR KENT THEREON; AND ALSO OF THE OPINION AND DECISION IN THE CIRCUIT COURT, OF NELSON, CIRCUIT JUDGE.

EDGAR KETCHUM,
Attorney for Respondent.
CHARLES O'CONOR,
Of Counsel.

NEW YORK:
WM. C. BRYANT & CO., PRINTERS, 41 NASSAU ST., COR. OF LIBERTY.
1862.

WILL OF LAWRENCE BENSON.

In the name of God, Amen. I, Lawrence Benson, of Harlem, Ninth ward of the city and county of New York, yeoman, being of sound mind, do make and order this my last will and testament, and do appoint and ordain Maria Benson, my loving wife, executrix, George C. Duryee and Benjamin P. Benson, executors of this my last will and testament; and do hereby revoke and disanull all and former wills, testaments, and executors whatsoever by me made, acknowledging this to be my last will and testament.

In the first place, I give and bequeath unto my son, Benjamin L. Benson, all that estate now occupied by George Williams, to do and dispose of as he may think proper.

I also give and bequeath unto my son, Benjamin L. Benson, the homestead where I now live, situated on Harlem River.

Secondly.—My will and intention is, that my son Benjamin L. Benson, do give unto my grandchildren, after the decease of my wife, the sum of fifteen hundred dollars.

Thirdly.—The income of these legacies, and also of my estate, real and personal, I give unto my loving wife, Maria Benson, during her widowhood, to do and dispose of as she may think proper.

In testimony of which I have hereunto affixed my hand and seal, the year of our Lord one thousand eight hundred

and twenty-one, on thirteenth day of February, and in the 46th year of the Independence of the United States.

LAWRENCE BENSON. [L. S.]

Witnesses—

JOHN B. WALDRON,
GROVE BEND WALDRON,
JOHN GOLEY.

Will proved the fifth day of November, one thousand eight hundred and twenty-two, and recorded in the Surrogate's Office, in the county of New York, in Liber 57 of Wills, page 473. Proved also in the Court of Common Pleas of New York, in March Term, 1828.

CHANCELLOR KENT'S OPINION.

I have read and considered the annexed copy of the Will of Lawrence Benson, and I am very clearly of the opinion that his son, Benjamin L. Benson, took an estate in fee under the will, *on the homestead whereon the testator then lived, situate on Harlem river*. He took a fee by reason of the charge which the will created upon him personally to pay the sum of fifteen hundred dollars to the testator's grandchildren, after the decease of his wife, and by reason of the devise or gift of the income of all the testator's real and personal estate to his wife, during her widowhood. If the son, Benjamin, did not take a fee, he might be a loser by taking the estate devised and paying the charge. I consider it to be well settled that a devise of real estate without any words of inheritance, but with such a charge upon the person of the devisee annexed to the devise, carries with it a fee. For the authorities in our own courts on this subject, and in which the English cases are collected and relied on, I would refer to *Jackson* vs. *Merrill*, 6 Johnson's Rep., 192; *Jackson* vs. *Bull*, 10 do., 148; *Jackson* vs. *Martin*, 18 do., 31; and the opinion of *Mr. Justice Story*, in 10 Wheaton, 231.

Those cases have declared and settled the law beyond all doubt or controversy.

JAMES KENT.

New York, January 11, 1828.

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CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK—IN THE SECOND CIRCUIT.

MARIA B. KING,
vs.
RICHARD ACKERMAN.

Opinion and Decision of the Court.

NELSON, C. J.—This is an ejectment to recover an undivided sixth part of a parcel of land described as the homestead in the will of Lawrence Benson, and situate at Harlem in the 12th Ward of the city of New York. The testator died, leaving a son, Benjamin L. Benson, and three grandchildren, the children of a daughter, Susan, the wife of the Rev. Dr. Milledoler. By his will, he devised, first, to B. L. Benson, the son, a parcel of land designated as then in the occupation of one George Williams, "to do and dispose of as he may think proper." Also, the homestead, where he then lived, situate on Harlem river; and second, declared his will and intention to be, that his son (B. L. B.) should give unto his grandchildren, after the decease of his wife, the sum of $1,500; and third, gave the income of the legacies, and of his estate, real and personal, unto his wife Maria, during her widowhood, "to do and dispose of as she may think proper." B. L. Benson, the son, died the 4th of October, 1852. This suit is brought by Mrs. King, one of the grandchildren, on the ground that the son (B. L. B.) took only a life estate in the homestead. The defendant claims under a title in fee derived from the son.

The principal question in the case is, whether or not the son (B. L. B.) took an estate in fee in the homestead by reason of the charge upon him personally to pay the legacies to the grandchildren. There is one feature in the case which is not found in any of the cases referred to on the argument, nor in any that have come under my own researches, and which, it is claimed on behalf of the plaintiff,

distinguishes it from those in which it has been held that the devisee took an estate in fee by implication on account of the personal charge imposed by the will; and, also, from the principle upon which these cases are founded. That principle is, where an estate is devised generally, or without words of limitation, and which, according to their legal import would not carry a fee to the devisee, if personally charged with debts or legacies, &c., in respect to the estate the devisee will take a fee by implication, otherwise he might be a loser instead of a gainer by the devise, which would be against the presumed intent of the testator.

The argument, on the part of the plaintiff is, that one of the parcels of land devised to the son, in respect to which the charge was imposed, is, upon the words of the will, in fee, and hence there is no necessity of creating a fee by construction or implication, in the other parcel, in order to save the devisee from loss. As we have said, no case has been found in this class of cases in the books, and they are numerous, containing this peculiar feature, and the argument founded upon it, to distinguish the case from the application of the general principle, is certainly deserving of great weight. But, after the best consideration we have been able to give to the case, we have come to the conclusion, not without some hesitation, that this new feature should not have the effect to rebut the implication of a fee derivable from the charge of the legacies to the grandchildren, or to distinguish it from the general principle upon which the implication is founded. We agree, if the position of the learned counsel for the plaintiff can be maintained,—namely, that the Court must be able to see, in other words, it must be certain, upon the face of the will, that the devisee will suffer loss should the life estate determine immediately after satisfying or assuming the charge before a fee can be raised by implication,—the case is with the plaintiff. For as one of the parcels is devised in fee, it is apparent that a loss cannot be certainly predicated, upon the termination of the life estate in the other, and hence, upon the above position, no implication of a fee in the "Homestead" could arise in the case.

But we are not satisfied that this is the true statement of the principle of this class of cases. On the contrary, we

are of opinion, if it appears upon the face of the will, that the devisee may be subject to a loss by reason of the charge unless a fee passes; in other words, the possibility of a loss by the termination of the life interest after the payment, or obligation to pay, the charge raises the implication of a fee.

And, assuming this to be the true statement of the principle, then, it is apparent from the will, that unless the son (B. L. B.) took a fee in the homestead, the personal liability to pay the legacies might subject him to a loss, as, for ought that appears, the other parcel might not be of sufficient value to satisfy the charge. There would, therefore, be the possibility of a loss, notwithstanding the gift of the fee in this parcel.

In answer to this view, it was proposed to prove, that the Williams lot, at the time of the making of the will, and also of the testator's death, was worth $5,000, which proof was rejected, and this raises the question as to its admissibility.

In the ordinary case of a devise of an estate, generally, and without limitation, and a charge in gross imposed personally upon the devisee in respect to it, the possibility of a loss is obvious, unless a fee passes, and this, however small the sum charged, compared with the value of the land. For the estate might be determined by his death before he could have realized the amount of the charge. And no proof on the subject *dehors* the will could change the character of the devise, or show that the possibility of a loss was unfounded. The inference of possible loss is inevitable from the two facts—life estate in the devisee, and a gross sum charged upon him personally in respect to it. Hence, few, if any, cases can be found in the books in which proof was received to influence the judgment of the Court upon the question. We have found none, and think the proof properly rejected upon general principles governing the construction of wills. There are cases to be found in the books where the value of the estate per annum is given in the statement, but in which it was wholly immaterial as respects the principle involved, and in most of the cases so regarded by the Court. (Vin. abr. Tit. Devise, pt. 26, 21, 18, 14. 6 Rep. Collier's Case.) It is to be ob-

served, also, that in England, when speaking of the yearly value of an estate, or its value in gross, there is a degree of certainty on the subject unknown in respect to the value of estates in this country. Leases for lives, or for a long term of years, or in perpetuity, for a given rent, determine the value, instead of referring the question to a jury to settle, where the value fluctuates with the differing opinions of the tribunal.

If there was a fixed determinate value in the present case of the Williams lot, as in the English cases referred to, we are inclined to think the fact would be received to rebut the inference of a possibility of loss. The proof would be in the nature of record evidence of the value.

There is another view of this will worthy of notice. A life estate in the two parcels of land is devised to the widow, subject to adetermination in the event of marriage. The estate, however, is regarded as one for life. The devise, therefore, of the homestead to the son was that of a remainder on carving out this life estate. A fee will pass under a will by implication, in case of a devise over of land after the death of the wife. The law presumes the intention to be that the widow shall be tenant for life, and the remainder man takes the rest of the estate. This principle is applicable to the present case.

The construction insisted upon by the plaintiff would give to the son the homestead for life only, after a life estate in it had been limited to the widow.

In reading the whole will it is difficult to come to the conclusion that this was the intent of the testator.

Judgment for the defendant.

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SUPREME COURT OF THE UNITED STATES.

MARIA B. KING,
Appellant,
vs.
RICHARD ACKERMAN,
Respondent.

Points on the part of the Respondent.

First Point.—The devise of the homestead to Benjamin L. Benson, the only son of the devisor, was a remainder in fee.

I. The devisor was unacquainted with technical forms, and employed none. If technical rules were wholly disregarded, there could be no doubt as to the actual intent.

II. The terms "to do and dispose of as he may think proper," being applied to the Williams property, do not by contrast reflect upon the devise of the homestead the implication of an intent to give less than a fee.

1. Those very words are applied to an absolute estate in the third clause.

2. At most, they exhibit an impression on the part of the devisor that a testamentary donee or heir has not, of common right, the power of disposition, and that, from the nature of his title, he is bound to hold the thing given, and transmit it to his family.

3. A father acting under this idea, would naturally desire to withhold from his son, in respect to the family homestead, the power of alienation.

4. Supposing this intent to have existed, and to be fully manifested by the will, it would only establish that the devisor intended to vest a fee-tail, and that, so far as the law would permit, his words have that effect.

5. A disposition of lands by will, which manifests an intent to give an estate in fee-tail, may take effect under our statutes, on this subject, so far as to vest the estate The moment it is vested the statute seizes upon and converts it.

Van Rensselaer *v.* Kearney, 11 How. U. S. R., 299.
Vanderheyden *v.* Crandell, 2 Denio, 9.
Wendell *v.* Crandell, 1 Comstock, 491. *

6. The devise of the homestead to the son was that of a remainder after carving out a life estate to the widow, and this passed a fee, by implication, to the son.

The law presumes the intention to be that the widow shall be tenant for life, and the remainder man takes the rest of the estate.

III. The requisition on Benjamin L. Benson, the devisee, to give $1,500 to the grandchildren, was a distinct personal charge upon him, in respect of the estate devised to him; and, consequently, by rules of construction fully established in this State, it gave a fee in the lands devised.

In the precise case before the Court, the decisions in the Courts of the State of New York are uniform.

Spraker *v.* Van Alstyne, 18 Wend., 212.
Barheydt *v.* Barheydt, 20 Wend., 584.
Heard *v.* Horton, 1 Denio, 167.
Olmstead *v.* Olmstead, 1 Comst., 483.
Olmstead *v.* Olmstead, 4 Comst., 56.
Mesick *v.* New, 3 Seld., 170.
Doe *v.* Richards, 3 T. R., 356.

* see also, Williams v. Lewis, Ho: of Lords' cases, p. 1026, fifteenth line from the top.
1 Perkins' Jarman on Wills, p. 421, note u.

Second Point.—The proposition to make the title depend upon the opinion of a jury, on conflicting evidence, as to the value of the Williams lot, is against all sound principle. The evidence was properly rejected.

1. The value of land fluctuates. The tide has its ebb as well as its flow.

2. The time of payment and of the devisor's estate taking effect in possession was future, remote, and contingent. Could the devisor divine the market value of the Williams lot at the day fixed for payment of the $1,500?

Root v. Stuyvesant, 18 Wendell, 274 - per Curiam J.

Last Point.—The judgment of the Circuit Court should be affirmed.

EDGAR KETCHUM,
Attorney for Respondent,
CH. O'CONOR,
Of Counsel.

ARGUMENT OF CHARLES O'CONOR, Esq,

For the Respondent.

In order to present the argument on our part in this case, it will not be necessary to occupy the attention of the Court very long; because the propositions advanced on the part of the appellant are, for the most part, so clear and so well settled that it will be unnecessary for us to dispute what has been said perhaps at any point. The question, after all, will be as to the application of these rules to the special case which has been presented to the Court.

With a great deal of propriety, as it seems to me, Mr. Benjamin F. Butler, in his written opinion on the part of the appellant, has presented the precise point of their case; and the stress of the argument is found on pages 2 and 3. I shall direct my attention mainly to considering the case, much as a question of fact would be considered, on the evidence of intention contained in the will itself; and, fortunately, the will is very brief.

It deals with but few subjects; the field of inquiry is comparatively narrow; and, therefore, there is little or no room for doubt as to the meaning. Hence, we are enabled to bring the attention of the Court, with a good deal of concentrated force, to the precise question which is presented here; and this, I think, we shall be able to do in a short period.

We must concede, as a proposition of universal acceptation, that a gift of lands, without further words, differs from a gift of chattels in this, that the gift is bounded by the life of the donee.

That is settled law; it admits of no question. In a deed of lands, particular words are required in order to vest an inheritance, or to give any other estate than one which is presumed to be an estate for life. On mere words of transfer, cession, or gift, judicial construction implies an estate for life. In a will, on the other hand, no technical words are required. In that respect, a will differs from a

deed; and it is only necessary, in examining a will, to ascertain the intention. In a will, an estate may be given by any words which are sufficiently persuasive to convey to the mind that an intention existed to give such estate.

There are, of course, series of decisions in reference to the particular aspects in which the evidence of intention has presented itself in wills; and, after reading a long series of decisions, the mind may be better prepared to deal with the question in a particular case—what was the intent of the words used in the instrument before us—than if this aid, light, and preparation were not obtained. But, after all, it is a truth, as has been often said, that no case upon a will has a brother. They all differ in some minute detail. Consequently, after having gathered, from a review of the decisions, such canons of construction as may have become sufficiently established and known to be fairly regarded as rules of property, where these are not in point, so as to be absolutely controlling, we are still obliged to look, with the eyes of common sense, at the language used in the particular case under consideration, and thence to deduce a conclusion as to the intent.

Therefore, in presenting the case, I will specially ask the attention of the Court to the words of the will itself, which, as I have said, is very simple, dealing with but few subjects, and in language of the greatest simplicity, there being a total absence of any technical terms whatever. There is nothing to indicate any knowledge of technical terms on the part of the devisor, or on the part of any assistant who may have been present at the time his testamentary intentions were reduced to form.

It is not necessary to read the first paragraph; that is very formal; it was probably copied from some other will which contained just those words, except the names. Neither is it necessary to read the last sentence, for that also appears to have been copied from some precedent; and so far I am willing to admit that the instrument is very formal. But these are the mere outworks; when we come to the disposing part itself, there is a total absence of any technical phraies, and quite clearly an ignorance of their effect. For, while there is much to lead us to suppose that there was no personal estate of any consequence, the testa-

tor, in no instance, in any part of his will, uses the word *devise*—the appropriate term applicable to any gift of real estate, whether for a day, for life, or forever. I do do not mean to say that this word is any way necessary; but it is the appropriate term, and the only one which would be used by any one having a knowledge of technical terms.

The will contains three distinct clauses. The first contains the disposition of certain real estate. The second contains the charge which has been so frequently spoken of, of $1,500, in favor of the grandchildren. And the third is a provision in relation to the wife, which will deserve some consideration, and to which, in the first place, I will call the attention of the Court.

It is as follows:

"The income of these legacies, and also of my estate, "real and personal, I give unto my loving wife, Maria "Benson, during her widowhood, to do and dispose of as "she may think proper."

The elements of this disposition deserve a moment's notice. The Court will observe, that there is here no gift of the personal estate. And also, that the capital of the personal estate is not in any way disposed of by the will. It is only the income that is given; and there is an intestacy as to the capital of the personal estate. Very probably there was but little of it. Still, what there was, is taken notice of by the testator, and the income thereof is made the subject of disposition; but it is clear that the capital is not given, because the disposition in this clause is confined directly to the income. "The income of these legacies," of course, means all the proceeds.

In the disposition of the real estate, "legacy" is, of course, a very inappropriate term. "And also of my estate, real and personal," says the testator; that is, the income of my estate, real and personal. "I give unto my loving wife, Maria Benson, during her widowhood, to do and dispose of as she may think proper."

That gives a life estate, subject to the contingency of being curtailed, as by a clause of cesser, on her marrying again.

Leaving out of view, for a moment, the question as to the disposition of the capital of the personal estate—as to which, I presume, it will be conceded that there is an intestacy—

I ask the Court, what is the meaning of the phrase, "to do and dispose of as she may think proper," in reference to the gift to the widow.

The Court will perceive that it does not apply to the capital constituting the fund; but applies only to the mere income.

These words, as here used, perform no functions whatever, in point of law; because the gift of the income to her is as absolute as words can make it, independently of that addition. Consequently, that addition is mere surplusage —mere verbiage. It was drawn from some precedent, used by one unacquainted with the use of precedents, or it has some special meaning other than, and different from, such an import as the vesting of an absolute estate. It has no meaning in law; and we cannot find out what the devisor meant only by a consideration of some circumstances rather outside of the law, but with which we may be acquainted from common experience in relation to the practices and opinions of men. It may very well be supposed, that a man not versed in the law might think that a married woman, receiving from her husband some portion of his estate, and being the mother of children, would be allowed not only to take, use, and enjoy it during her life, and that what was left was not at her disposition; that it was, in some sense, by some binding law (the exact quality of which was not considered by the testator), subject to an obligation on her part to transmit it to their common posterity unimpaired, except by use and necessary enjoyment during her life.

And whether we reach into the rules of construction which have been established in the law, or look to the presumable intentions or motives of parties in the use of given language, or to the learning or the ignorance in which the adoption of certain words may, in known instances, have its origin; it is not easy for us to suppose any other sensible, active, and operative reason, influencing the mind of the testator in adding those words, than some such

conception as I have indicated; to wit, that it was the duty of the mother and widow to transmit to the family what might be left in her hands of the family estate. I suppose it is a fair conclusion that that intention did exist, or that the words mean nothing. I do not think that it is a very fair presumption, in considering the meaning of instruments, to suppose that the words mean nothing; and, I think, reason and justice favor the idea that some intent is conveyed by every word used, to which you can, upon any principle, attribute a reasonable meaning. Therefore, it may be supposed that this testator intended to relieve this lady, during her life, from any accountability as to this property, or any liability in herself or her representatives to be called to an account by her children touching her disposition of it. He did not mean that she should be subjected to annoyance about the property in any way. This is somewhat akin to the idea of the clause—"without impeachment of waste"—sometimes inserted in wills where a life-estate is given, though, of course not so technical and careful as that clause, yet akin to it. The testator meant that she should be free, that she might do what she pleased; that, in respect to this fund, she might have complete dominion independently of her children; that she should not be subjected in her old age to any offensive scrutiny on the part of her children, to their ingratitude or want of proper obedience. I suppose that to be the proper meaning and import of these words in this place.

The Court will see in a moment why I have thought it proper to devote a little time to illustrating my views on this subject.

These very words occur in another place, and are sought to be used for a purpose specially devised by our opponents, and which they conceive is calculated to advance their side of this argument.

I now go back to the first disposition, which relates to these two pieces of land, which very probably constituted all his landed estate. I do not take that circumstance into view. Probably it would not be material, and we have no proof of it in the case. These two pieces of land, it may be said, are in the same chapter of the will; they are not

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separated; they are put together, under one head, as disposition in the first place.

"In the first place, I give and bequeath unto my son "Benj. L. Benson, all that estate now occupied by Geo. "Williams, to do and dispose of as he may think proper."

It has not been claimed on the other side—I do not see it in any of the opinions—that the word *estate* in that particular place has any special advantage over what would be the result, as to that disposition in case the word *farm*, or *lot*, or something of that kind, had been used, because the reference is to it as a physical object. But here follow the words to which our adversaries attach so much importance—"to do and dispose of as he may think proper." They say that these words necessarily imply an absolute power of disposition and sale, and that, therefore, they necessarily prove to the Court an intent upon the part of the devisor that the devisee should have an absolute interest, such as would enable him to make an absolute disposition. I do not deny it: I think that is the meaning of the words, and that there they mean exactly what they mean in the other place. In this respect, I suppose I am travelling upon very sure ground, because the Court will favor the idea, if the circumstances admit of it, that the decedent was a sensible and rational man, and that, in using a particular form of language which may have been borrowed from some other instrument, especially in a brief will like this, he meant the same thing each time he used the same expression. I think he did. He meant that the devisee should have an absolute power of disposition; and I have no doubt that, in respect to both of those places where that language is used, the testator probably had exactly the same motives for giving that absolute power of disposition. He thought that property coming from an ancestor to an heir, to one of his family entitled to take it from him, whether coming by direct descent or coming by will, was, in the absence of any license to alienate, in the nature of entailed property, and that the possessor was bound to enjoy in and to transmit it to his family. In other words, that as to inherited estates, whether real or personal, they belonged to the family, and that rightly they could be enjoyed by the family only, and should, at the death of the

possessor, pass to the family; and, therefore, without consciousness that the words already used would give any particular estate less than an entire fee, he added this license to alienate.

In relation to the property in question, the homestead, my idea is that the testator did not intend that Benjamin should alienate it, but that he should take it according to this conception which the testator had of the nature of the estate inherited from an ancestor, drawing no distinction between inheritance by law and the *haeres factus* created by a will. When I say *drawing no distinction*, I believe I reason according to the methods in which these plain and simple people reason in relation to their property. Now, it was very natural and very proper that the testator, whilst intending to give the homestead absolutely to his eldest son and to his only male child living, (and the only male child he had ever had as far as appears,) should desire that, as to the homestead, he should not have the power of alienation, but that as it had come to him from his father, it should pass from Benjamin to his heirs, and continue in the family forever. This is the view I take of the true construction of this will as affected by the fact that these words, "to do and dispose of," are found in two places and not found in the third. In one of the places it is found accompanying undoubtedly an absolute gift in fee simple. In the gift to the widow it is found superadded to an absolute gift; thereby indicating a conception, however erroneous, on the part of the decedent that, in cases of this description, it was necessary to add to the gift of an absolute interest a license to alienate in order to relieve the donee of such absolute interest from this moral or legal obligation to husband and suitably enjoy the property during life and transmit it to the family at death. Therefore, I say that those words, both when used in relation to what is called the Williams property and the widow's share, were used in the same degree of light, or in the same measure of darkness—whichever the counsel may pe pleased to call it—as to the necessity of superadding the license of alienation; and in neither case is the idea conveyed that the testator knew that the words he was using conveyed less than the absolute interest, or that

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these superadded terms, or something equivalent, were necessary to render that interest absolute. In order to make myself understood in a single sentence I say this: Those words are not used in either place to create perfection or absoluteness in the gift already named, nor do they indicate that the testator knew or supposed that the gift was not absolute. In the case of the widow it is clear that he has used terms of gift which are the most absolute in meaning and legal effect that can be conceived, and yet he superadded this license to alienate.

In the case of the Williams lot, conceding, if you please, that he used words which do not of themselves convey an absolute estate, yet I say the adding of these words, "to do and dispose of," affords no evidence that he supposed he had not used words adequate to convey an absolute estate. Quite the contrary. Referring to the other place where they are used, they plainly imply an opinion on the part of the decedent that in the case of a family estate of this description, a license or express power to alienate was necessary to be superadded, and that the right did not exist or was not given by law as an incident to ownership in the case of a family estate.

This view of the case—this view of the presumable state of the testator's mind, of his wishes, intentions, and conceptions as to the law, is strongly fortified by a manifest distinction between the nature of the Williams property and the nature of the property now in question.

The property in question was the family homestead. It is not only called the Homestead—which is a sufficient indication of its character as connected with the family—but the fact is expressly and distinctly stated by adding "whereon I now live."

The intent, then, as to the homestead was to give the ancient inalienable fee-simple of the feudal law (Burgess *v.* Wheate, 1 Eden's R., 191), or, its modern modification, the estate-tail. Either of these being intended and given, would vest under our law, as it existed when this will was made, a fee simple absolute. So much for our ideas of the view and intent of the testator in using these words "to do and dispose of as he may think proper."

Of all that fell from one of our opponents in the Court

below, perhaps I should not find much fault with anything except his play upon the words "express" and "implied." Perhaps there are few things which figured more to produce confusion in the course of his argument than those very words "express" and "implied." Permit me to say that, so far as these words have any meaning, or rather any application to the inquiry before the Court, this will gives no express estate at all. It never does anything but *give*, unless, indeed, the words "during widowhood" may be said to be something like the specification of an express estate. And those words are used to curtail, not to amplify the interest. But in reference to this branch of the case, of which my learned friend spoke, and to which he addressed this part of his argument, the words *express* and *implied* have no application whatever.

We have nothing but in the will the indication of a mere intent to give without qualification, the words of gift employed throughout are simply those of gift without qualification. These do not create an *express* estate at all.

For the purpose of giving an express less than a fee the words should have been, "I give to my son Benjamin such a piece of land for and during his natural life," or "for such a term of years," or "during the life of such a person, so long as he shall live in such a place," or something of that kind. Mere words of gift found in a devise are never said to give an *express* estate. The estate taken, whatever it be, is mere matter of *implication*. Nothing is here said about the estate; nothing is said about the interest; in that respect the will is entirely silent. It is true we can find out what estate is given, that is to say, what effect is produced by the words used; and by turning to the law we find that it has been long settled that when, by mere words of gift pure and simple, lands are given, without any limitation or qualification whatever, an estate for life will be implied. The Courts find that no particular estate is expressed, but, as the land is a physical existing thing, and the donee is an existing person, as long as the land and the donee are to be found, the land belongs to the donee. Thus by an implication the gift is deemed an estate for life. The testator has not said so, but the Courts infer it.

Inference and *implication* are two words meaning the

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same thing. It must be inferred that the testator did not mean that the son should have it only for a week, and as he has not said how long, it is an inevitable implication that he is to have it as long as he may be *in rerum naturae.* It will be seen that there is no estate expressed as being given in reference to any part of the property; and the Court has to find out how much estate it was intended that the son should take from all the circumstances.

I say, then, that we have nothing to do with express estates; for there are none limited by this will. I admit that when, by express words, a particular estate is limited, the Court cannot imply anything different in the face of such express declaration of his intent by the testator. But when there is an absence of any express limitation, and all is left to inference, the field is clear for the Court to imply either an estate for life, or a larger or different estate, or even a less estate, if there be circumstances disclosed from which the Court can see with clearness that such an intent existed. My friend on the other side, spoke in the Court below, of implications that are necessary. That attempt at classification is after all very little more than mere words. I suppose that the Court is never to draw any implication but a necessary one—i. e. an implication necessary to the right and justice of the case, and necessarily deducible from a fair understanding of what the testator has said. I am free to admit that certain learned judges have said much about a necessary implication, and have sought to establish a line of discrimination between implications which are very strong and those which are less strong. But it is agreed that a necessary implication does not mean a physical necessity, but means only such an implication as the Court is bound to draw from words which do not reasonably admit of any other construction. It is very difficult to bring to mathematical exactness the different influences which must guide us in relation to a subject so subtle as the operation of the human mind in eviscerating from a few words, a meaning which is not distinctly and absolutely expressed.

Having disposed of that part of the argument which refers to the use of these words, "to do and dispose of as he or she may think fit," I come down to the consideration of the particular devise in question.

" I also give and bequeath to my son, Benjamin L. Ben-
" son, the homestead where I now live, situated on Harlem
" river."

Here is no express limitation; here are no words of limitation whatever, and the rule is as old as the law and utterly impossible to be shaken, that, by force of these words alone, the donee would take no greater interest than an estate for for life.

The testator has not expressed the idea of giving him any more, and the Courts cannot see any method of giving him any less. Consequently it is a necessary implication that he should take for life.

I need not here refer to, nor do I seek benefit from what is said about as often as any other thing on construction in the law books, i. e., that in all the adjudicated cases in which this rule has been applied, the intent of the testator has been defeated.

The intent has been defeated so often by this rule, that I admit it has become a rule of property, and I seek not to overturn it. The judges who have thus condemned the rule, have nevertheless uniformly applied it. So I must admit that it is too strong to be broken away from.

It is probably a fact, that a case has never arisen in which the rule was applied, without the innermost feeling and intent of the testator being defeated. Nevertheless, it is a rule, and must stand, and we do not seek to escape it; but there is another rule equally well established—as old as the days of Coke—which insures our safety. Where, on a gift of lands without limitation, there is a charge on the person of the devisee, which the devisee will incur as a binding personal obligation, if he accepts the devise, he becomes a purchaser. And as a purchaser under a will and not a deed, purchasing without words of limitation or qualification, he, by reasonable inference and construction, buys the the thing absolutely. As in all other like cases of purchase, the Courts will supply any words of limitation or any assurances that may be deemed necessary to make the title absolute and perfect. This rule will not be drawn in question.

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The distinctions which have been made in a variety of cases, are these:

First.—That when the sum charged, is merely a charge upon the rents or profits or income of the estate devised, or lands given, then the charge is not such incumbrance on or charge upon the person of the devisee, and he is not a purchaser; he is a mere taker on condition, that so far as the rents and profits may go they shall be applied to the subject of the devisor's bequest touching the rents and profits.

In such a case there is no implication in favor of the donee. That distinction I shall, of course, yield to. It is sensible and rational; and the principle which treats the devisee as a purchaser, when, at the moment of taking the grant, he must charge himself with a duty in favor of some third person, is equally clear, if it never had been established by authority. It is a construction required by the plainest perceptions of justice, and by our knowledge of the common opinions and experience of men. It is as clear as any implication that could possibly be presented for the adoption of the Court. The question then in this case is, whether there is a personal charge on the devisee. We read the second clause by itself.

"My will and intention is, that my son, Benjamin L. "Benson, do give unto my grandchildren, after the de- "cease of my wife, the sum of fifteen hundred dollars."

The testator forgot to put in at this place anything about the contingency of the widow's re-marriage. The Court can see that it was intended. Its omission serves to show the want of careful perception, and of careful attention in framing the provisions of this will to meet the exact objects in view. "My will and intention is that my son, Benjamin," etc. Now here is a positive and direct injunction upon Benjamin. It is as if he had said, "I command that he shall give to my grandchildren." The Court will observe that these were the testator's other heirs, his daughter being then dead. It is not a direction to pay out of the rents and profits of the property, but to pay the sum absolutely.

It is a positive, imperative, personal direction to pay that sum; and, of course, Benjamin could take no interest under the will, without subjecting himself to that charge. Let us see whether it is not, in every conceivable respect, a personal charge. If the Court will look to the first branch of the will, it will perceive that there are three executors named. Benjamin L. Benson is not one of them.

But if Benjamin L. Benson was one of the executors, the case would stand about as well; for, even in that case, while there were two executors living at the time the payment was required, the obligation to pay was put upon the son Benjamin only. I need then go no further; he had nothing to do with the personal property. There is no gift of any part of the personal property to him, either personally or officially; and, of course, there is no possible escape from the conclusion that there is a personal charge.

In this point, the argument is at an end, unless I should weary the patience of the Court with senseless repetitions.

There is no possibility of struggling against, or avoiding in any way, the conclusion that this sum of fifteen hundred dollars was a personal charge upon Benjamin L. Benson, in favor of the testator's other heirs.

What is the rule that my learned friends upon the other side admit? It is, that if a personal charge be imposed upon a party, in a will, by reason of, or in respect of a gift of lands to him, he shall take a fee. They admit this, but they say it is subject to a certain qualification. They say, if you can make it clear and sure that the devisee might accept the devise, taking less than a fee in some part of the lands, and yet not suffer loss, then the reason of the rule ceases, and the rule also ceases to apply or govern the construction; that in such a case the rule has no application. For the purpose of bringing this proposition to bear, certain testimony was offered at the trial, which was excluded. Leaving out this circumstance that the Williams lot was worth enough to pay this $1,500, it is conceded that, according to the settled rules of law, or the settled course of decisions and construction in the State of New York, Benjamin L. Benson took a fee. Consequently, the question we have to argue here is, whether that kind of

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evidence is admissible. And what is the proposition on this head?

It is proposed to show upon the trial that, at the time the decedent made his will, and at the time of his death, this Williams lot was worth enough in the market to have paid the $1,500.

I think we shall arrive at rather a lamentable state of things whenever it is found that land titles in the State of New York turn upon such questions. The Court will perceive that that would not be a question for the Judge; it would be a question necessarily turning upon the view which a jury might take of the weight of evidence; and a jury, in one case, as to one of these lots, would find in one way, and as to another, would find another way. Juries would persistently, in spite of new trials granted by the Court, find contrariwise as between these plaintiffs and the different tenants of this large tract of land, now turned into a village, with a house on every 25 feet of front. There are circumstances about these land cases which will operate upon what are called the affective faculties of the mind, and that would greatly influence juries.

If a lawyer owned one of these lots, the jury might think it was no great harm if he should lose it; as he lived by the sword, let him die by the sword; the weight of evidence is against him, and the plaintiff would get his lots.

But if the defendant, living on another lot, should happen to be a poor fellow who sawed wood for a living, who had built a house upon his lot, and who would be utterly ruined by a verdict against him, the jury would note these circumstances, and, considering that he had a wife and children, and was a good citizen, they would be very apt to think it horrible injustice to deprive him of his property. The weight of evidence would be adjudged to be in his favor, and the plaintiff would fail in that case.

I do not find in the annals of the law any cases where questions of this kind present themselves, though I have searched the books. I have not been able to discover, in any case, that a matter of fact like this, so uncertain a point as the value of property has ever been mingled up with the question of construction in any way so as to make the point—whether an estate in fee or a different estate should

be taken by implication—become in truth and in effect a jury question. There are no instances of it, and I think it would be a most inconvenient and dangerous rule to introduce.

I refer here to the case of Spraker *vs.* Van Alstyne, and a series of other cases, in all of which this doctrine is laid down in the most clear and distinct terms. It is a settled canon in the laws of construction, that where the testator omits to limit any estate and his will is entirely a blank in that respect, that is, if it contains a mere donation, and there is a personal charge upon the devisee, then the legal implication that he shall have it only for life cannot take place, and the devise is treated as an offer of sale tendered to the devisee, and, as such, from the absence of words of qualification, an absolute purchase is the construction of the offer, according to the law of the State of New York.

All these cases recognize this rule; so that there is really nothing to be considered in this case but whether we are to have the question thrown into the jury box, and there made to turn upon the opinion the jury may form of the value of the lot occupied by one Williams, on the island of New York, at some period to be fixed by the Court. The proper time to be stated it would puzzle me to define. My learned friend, and those who have given opinions on his side, have conceived that it was quite important to show that the Williams lot was of sufficient value to pay this $1,500, at the date of the will, but no one of them has been satisfied to put the question on the proof of its sufficiency at that particular point of time. And it is clear that that would not be the proper time of valuation. The testator did not expect to die on the same day on which he made his will. He probably expected to live some time. And in fact, he did live some time. Of course, then, if the testator intended that his son should have, as a fund out of which to pay this $1,500, nothing but the Williams property in absolute ownership, he must have looked forward at least as far as to the period of his own death. When that was to happen, what would be the state of the market at that time, whether there would be an absolute sacrifice of the property in consequence of a depreciated market at that time, he could not tell.

Therefore, they have thought it necessary, in their offer to this Court, and the learned counsel who have given them opinions have thought it necessary, to look to the testator's death as the period. That, too, is quite an artificial idea. He could not have had an intent based upon the value of property at that time. That is merely a lawyer's idea, borrowed from the technical rule that a will has its perfection and takes effect at death. But the learned counsel who fix this as the proper period of valuation seem to have left out of view the fact that the testator must have looked at a different period from either the time he made the will, or the time of his own death.

The period at which he ought to have looked, if thinking of a valuation, was the period at which he made this sum payable, and that is, at the time of the death of his wife. He evidently anticipated that she would survive him, and she might have survived him a great many years. The devisee was not to be called upon to pay this sum, or to come into possession of the land, until the widow's death. If he was to pay it out of this property, that was the time as of which the property should be appraised, to ascertain its sufficiency for the payment.

That was the time at which he would be obliged to raise the money, by sale of it, to make the payment. The testator had no possible means of knowing when that would be. And what might then be the value of the lot was necessarily a matter of the most vague conjecture.

My learned friends may say that real estate in this country, though it fluctuates in value from time to time, is subject to variations in one fixed direction only; that it is always enhancing and increasing in value; but such is not the truth, as we well know. Even in the most favored part of this country, and perhaps in the wide world—the little island of New York—favored by nature and by circumstances in the last degree in which a spot of earth can have earthly advantages—even here, within the recollection of all of us, property has risen to vast prices, and has fallen to one-tenth of that value, and has risen again, and again fallen in price. This identical piece of property, the Williams lot, since the date of that will, could have been

bought and sold at prices varying wonderfully, varying as one to twenty.

I say, in the first place, that the title to land should not be permitted to turn upon questions of that character.

In the second place, I say, that if the Court should think it proper to look at question of value, you would perceive that the testator could not have had any knowledge what would be the value of the land, in which it is said a fee simple was unmistakeably given, at the point of time when his son might be coerced to pay this sum of money; and consequently the value of that land, as a distinct subject from which to obtain the means of paying this legacy of $1,500, could not have entered into his contemplation, consequently the gift of these two pieces of land, placed as it is in one section, must be taken as an entirety; and the sum specified in the second clause of the will must be regarded as a condition imposed upon the devisee in respect to the whole property mentioned in that section.

It is proper to say that in the cases to which the Court has been referred, there are numerous instances where the charge was exceedingly small, such as twenty shillings—so trivial that one could hardly suppose that such an idea ever entered the mind of the testator as that he must give the fee, lest his heir, who had to pay the twenty shillings, might die half an hour after, and suffer loss. It would seem as if the Courts were entirely willing—as against the rule calling for words of limitation in a will—to seize upon any clear proposition applying to a large class of cases which would rescue the intent of the testator from being wrecked on the rock of technicality. In the decided cases there is quite frequently other property given to the devisee, that is to say, chattel property; but the Courts have never allowed questions of relative value to be gone into. They have never tolerated an examination into the presumable or probable market value of the devise or bequest. There is often a vast disparity between the value of the subject given, or the presumable value of a life estate in it, and the petty legacy on the strength of which the Court has been enabled to supply words of limitation, and rescue a devise of this kind from shipwreck. The reason is perhaps hardly sufficient to sustain the Courts. But they have

established this dogma, just as they have established the pernicious dogma which it restrains. It has become one of the settled rules of law that a charge of this description shall have this effect; and it is only in that way that the rule can be useful. If it is made a less fixed or an uncertain rule, determinable upon the opinions of a jury, titles would be rendered uncertain, and much mischief would be introduced. It is undoubtedly quite clear that if a man left me by devise a life estate in the Astor House, that is, if he simply devised to me the Astor House, without words of limitation (by which I would only have taken a life estate), and, in the same will, he had imposed upon me a duty to pay sixpence to an apple-woman at the corner of St. Paul's Church-yard, that would have been enough to give me a fee under the law as it existed when the will was made. There are cases of just such insignificant charges as this illustrating the rule. Now, it is clear that, in such a case, I could easily bargain with one of my neighbors to buy my life-estate before actually committing myself; and then, even if I died within half an hour, my heirs would be very well off, though they should be obliged to pay the sixpence. So, this argument, founded on the possibility of a man's dying the next instant, when you come to apply it to exceedingly small charges, strikes one as quite frivolous. It seems hardly sufficient to sustain the conclusion.

When the rule was originally established that an action of assumpsit lay on the common count, Chief Justice Vaughan said that it was founded upon reasons scarcely fit to be heard among school-boys, much less to be assigned as grounds of decision by grave and reverend Judges. Perhaps as much might be said of both the rule requiring and that dispensing with words of limitation. But rules may stand, however weak the reasons may seem.

The reason which our opponents think without application to the present case, is not the valuable element in the decisions.

It is the rule itself which is valuable and convenient, not the reasons; and the Court should not be too astute in endeavoring to take the case out of the rule.

One of these cases has been tried in a State Court. It

has not yet received the judgment of the General Term of the Court; but the very respectable judge presiding at the trial rejected this evidence, and directed the jury to find a verdict for the defendant. It thus appears that the first independent and impartial judicial mind that has been required to pass upon this case has pronounced it free from doubt, and decided with us. I trust this Court will come to the same conclusion.

This is one of the series of cases that may be found traveling through the books.

It appears to be a part of the history of every great city and tolerably prosperous village in our growing country, that, by the time they have got the old farms which formed their sites turned into streets and avenues, and planted over with the dwellings and shops of a busy population, there is found some flaw in the documents on which the title rests. Thus some antiquated question springs up, and the posterity of him who originally sold it for a trifling sum are tempted to possess themselves of that which the labor of others has converted into a vast property. No particular favor is due to such cases. They are entitled to full justice, but no more.

It would be dangerous, indeed, in any country, and under any circumstances, if the title of land turned upon such mere questions of fact for a jury as the one attempted to be raised here by the offer of evidence touching the value of the Williams lot. But it would be inconceivably mischievous and dangerous in a country like ours, where such great and rapid changes take place, if titles arising under charges were, in this way, subjected to the varying conclusions of juries, as to the weight of evidence on such an almost intangible question as the value of lands in remote spots, and at remote and distant periods.

The defendant was surprised at receiving a printed re-argument from the plaintiff, especially at much length of time after the argument in open Court. One novel idea and one mis-statement in that re-argument demand notice.

I. The counsel for the defendant was not "forced to ad-

"mit on the argument that the testator did not in fact in-
"tend to give a fee in the homestead."

See Plaintiff's Printed Paper, page 7, subd. 4.

This is a total misrepresentation. On speaking of the possible or presumable idea of the testator's omission to superadd as it respects the homestead the express license to alienate which he had unnecessarily and uselessly superadded to other absolute gifts, it was suggested as probable, that the intent may have been "*to give the ancient inalienable fee simple of the feudal law,* (*Burgess* v. *Wheate*, 1 *Eden's R.*, 191,) *or its modern modification, the estate in fee tail.*"

And it was contended that "*Either of these being intended and given would vest a fee simple absolute, under our law as it existed when this will was made.*

Both were "*fees*" in fact and in law. Both were called "*fees*" in practice. Both were absolute gifts, the grantee having an inalienable but absolute estate in the one case, and an ownership absolute in the other, though restricted to a peculiar method of aliening.

II. The novel idea adverted to involves something very like a paradox. It is at least an attempt to reverse the reasoning under consideration as it is laid down in the books. The reasoning is, that if the devisee should accept a life estate carrying a personal charge, he might suffer a loss—not that he *would*, but that he *might*.

See Pltff's Fifth Head, page 5.

Uncertainty as to whether it would be a loss or a benefit is the basis of the reasoning. The testator is presumed to intend a *certain* benefit and not to expose the devisee to any *possibility* of loss.

1. In this case the testator did not use words aimed at or intended to perform the technical office of giving a fee in any instance. So there is no contrast favoring the plaintiff.

2. Words limiting or defining the interest given or intended to perform that office are used only once. That is in the limitation to Mrs. Benson during widowhood.

3. So it seems that the testator's notion of conveyancing conformed precisely to the vulgar opinion that unqualified words of gift vest an absolute interest, and that if less than an absolute estate is intended to be given, such intent must be expressly stated.

This evident fact makes the presence of restrictive words in the gift to the wife, and their absence in the gift to the son, afford a contrast very unfavorable to the plaintiff.

III. The true ground on which these cases of *personal charge* rest is, that the devisee is a *purchaser* by agreement between himself and the devisor. The consideration of relative value has no place in weighing such a transaction. In an agreement to sell, words defining the estate to be sold are necessary only when less than the entire fee simple is intended to be sold.

The reference still more lately made by plaintiff's counsel to *Burlingham* v. *Belding*, 21 *Wend.*, 463, suggests a view of this case not urged upon the argument which may certainly deserve attention.

That case presents a close scrutiny into the connection between the *charge* and the *devise*. And it deduces a result unfavorable to a claim that the charge was in respect of the devise, or would enlarge the effect of the words used in the devise, wherever such connection was not apparent, or at least wherever the charge seemed to be founded on some other gift.

This view is strongly against the plaintiffs. No interest is given to Benjamin L. Benson except in the Williams lot and the homestead. So the charge cannot be in respect of anything given him except one or both of these lots.

The Williams lot he was "to do and dispose of as he might (may) think proper."

These words certainly imply that Benjamin was to take the Williams lot *free of all charges or incumbrances whatever.*

If he was bound to raise $1,500 out of it he would not have power to dispose of it "*as he might think proper.*" On the contrary, the residue only would be thus delivered over to his absolute disposition.

The devise of the homestead is not declared to be unfettered or free from charges or incumbrances; and it is in immediate local proximity to the charge, the mere mechanical division "*secondly*" alone separating the devise from the charge. The moral and physical connection is apparent.

The case cited presents the importance of this connection in a strong light; and it is therefore a decided witness for the defendant.

CH. O'CONOR,
Of Counsel for Respondent.

E. KETCHUM,
Attorney.

In addition we beg the attention of the Court to another view of this will taken by Mr Justice Nelson and found on page 6 (ante) 3d paragraph; where the principle is applied to the present case, that a fee will pass under a will by implication upon a devise over of land after the death of the wife. And as a life estate in both parcels is devised to the widow and afterwards they are devised to the Son, the latter is that of a remainder after carving out this life estate, for the law presumes this to be the intention of the testator. And so Benjamin L. Benson took a fee in the homestead.

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HEIRS OF LAWRANCE BENSON

AGAINST

GRANTEES OF L. BENSON'S DEVISEE.

POINTS.

J. B. IRELAND,
Attorney and of Counsel for Plaintiffs in Error.

P. Y. CUTLER,
AND
J. S. BLACK,
} *Counsel for Plaintiffs in Error.*

WASHINGTON:
HENRY POLKINHORN, STEAM BOOK AND JOB PRINTER,
D street, between 6th and 7th.

Circuit Court of the United States,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

MARIA B. KING,
vs.
RICHARD ACKERMAN.

NELSON, C. J.—This is an ejectment to recover an undivided sixth part of a parcel of land described as the homestead in the will of Lawrence Benson, and situate at Harlem, in the Twelfth Ward of the city of New York. The testator died leaving a son, Benjamin L. Benson, and three grandchildren, the children of a daughter, Susan, the wife of the Rev. Dr. Millidoler. By his will he devised first to B. L. Benson, the son, a parcel of land designated as then in the occupation of one George Williams "to do and dispose of as he may think proper." Also, the homestead, where he then lived, situate on Harlem river, and second, declared his will and intention to be that his son (B. L. B.) should give unto his grandchildren, after the decease of his wife, the sum of $1,500, and third, gave the income of the legacies, and of his estate, real and personal, unto his wife Maria, during her widowhood, "to do and dispose of as she may think proper." B. L. Benson, the son, died 4th October, 1852.

This suit is brought by Mrs. King, one of the grandchildren, on the ground that the son (B. L. B.) took only a life estate in the homestead. The defendant claims under a title in fee derived from the son.

The principal question on the case is, whether or not the son (B. L. B.) took an estate in fee in the homestead, by

reason of the charge upon him personally, to pay the legacies to the grandchildren. There is one feature in the case which is not found in any of the cases referred to, on the argument, nor in any that have come under my own researches, and which it is claimed, on behalf of the plaintiff, distinguishes it from those in which it has been held that the devisee took an estate in fee by implication on account of the personal knowledge imposed by the will, and also from the principle upon which these cases are founded.

That principle is, where an estate is devised, generally, or without words of limitation, and which, according to their legal import, would not carry a fee to the devisee, if personally charged with debts or legacies, &c., in respect to the estate, the devisee will take a fee by implication, otherwise he might be a loser, instead of a gainer, by the devise, which would be against the presumed intent of the testator.

The argument on the part of the plaintiff, is, that one of the parcels of land devised to the son in respect to which the charge was imposed, is, upon the words of the will, in fee; and hence there is no necessity of creating a fee by construction or implication in the other parcel, in order to save the devisee from loss. As we have said, no case has been found in this class of cases in the books, and they are numerous, containing this peculiar feature; and the argument founded upon it is to distinguish the case from the application of the general principle is certainly deserving of great weight. But after the best consideration we have been able to give to the case, we have come to the conclusion, not without some hesitation, that this new feature should not have the effect to rebut the implication of a fee derivable from the charge of the legacies to the grandchildren, or to distinguish it from the general principle upon which the implication is founded. We agree, if the position of the learned counsel for the plaintiff can be maintained—namely, that the Court must be able to see, in other words, it must be certain, upon the face of the will, that the devisee will suffer loss should the life estate determine immediately after satisfying or assuming the charge before a fee can be raised by implication—the case is with the plaintiff. For as one of the parcels is devised in fee

it is apparent that a loss cannot be certainly predicated upon the termination of the life estate in the other. And, hence, upon the above position, no implication of a fee in the homestead could arise in the case.

But, we are not satisfied that this is the true statement of the principle of this class of cases. On the contrary, we are of opinion, if it appears upon the face of the will that the devisee may be subject to a loss by reason of the charge, unless a fee passes, in other words, the possibility of a loss by the termination of the life interest after the payment, or obligation to pay the charge, raises the implication of a fee.

And assuming this to be the true statement of the principle, then it is apparent from the will, that unless the son (B. L. B.) took a fee in the homestead, the personal liability to pay the legacies might subject him to a loss, as, for aught that appears, the other parcel might not be of sufficient value to satisfy the charge. There would, therefore, be the possibility of a loss, notwithstanding the gift of the fee in this parcel.

In answer to this view, it was proposed to prove that the Williams lot, at the time of the making of the will, and also of the testator's death, was worth $5,000, which proof was rejected; and this raises the question as to its admissibility.

In the ordinary case of a devise of an estate, generally, and without limitation, and a charge in gross imposed personally upon the devisee in respect to it, the possibility of a loss is obvious, unless a fee passes, and this, however small the sum charged, compared with the value of the land. For the estate might be determinnd by his death before he could have realised the amount of the charge, and no proof on the subject dehors the will, could change the character of the devise, or show that the possibility of a loss was unfounded. The inference of possible loss is inevitable from the two facts—life estate in the devisee, and a gross sum charged upon him personally in respect to it. Hence, few, if any, cases can be found in the books in which proof was received to influence the judgment of the Court upon the question. We have found none, and think the proof properly rejected upon general principles govern-

ing the construction of wills. There are cases to be found in the books where the value of the estate per annum is given in the statement, but on which it was wholly immaterial as respects the principle involved, and in most of the cases so regarded by the Court. (Vin. Abr. Tit. Devise pt., 26, 21, 18, 11, 6 Rep. Collier's case.)

It is to be observed, also, that in England, when speaking of the yearly value of an estate, or its value in gross, there is a degree of certainty on the subject, unknown in respect to the value of estates in this country. Leases for lives or for a long term of years, or in perpetuity for a given rent, determine the value, instead of referring the question to a jury to settle, where the value fluctuates with the different opinion of the tribunal.

If there was a fixed determinate value in the present case of the Williams lot, as in the English cases referred to, we are inclined to think the fact would be received to rebut the inference of a possibility of loss. The proof would be in the nature of record evidence of the value.

There is another view of this will worthy of notice. A life estate in the two parcels of land is devised to the widow, subject to a determination in the event of marriage. The estate, however, is regarded as one for life. The devise, therefore, of the homestead to the son, was that of a remainder on carrying out this life estate. A fee will pass under a will by implication in case of a devise over of land after the death of the wife. The law presumes the intention to be, that the widow shall be tenant for life, and the remainder-man takes the rest of the estate. This principle is applicable to the present case.

The construction, insisted upon by the plaintiff, would give to the son the homestead for life only, after a life estate in it had been limited to the widow.

In reading the whole will, it is difficult to come to the conclusion that this was the intent of the testator.

Judgment for the defendant.

Supreme Court of the United States.

MARIA B. KING, Pl'ff in Error,
vs.
RICHARD ACKERMAN, Def't in Error.

STATEMENT OF FACTS.

This is an action of ejectment. The plaintiff claims, as one of the heiresses at law of Laurence Benson. The defendant claims under grant from Benjamin L. Benson, to whom Laurence Benson devised two parcels of real estate, one of which was called the Williams estate, the other the Homestead. The land claimed in this action is a part of the Homestead. The words of the devising clause are,

> "In the first place, I give and bequeath unto my son Benjamin L. Benson all that estate now occupied by George Williams, TO DO AND DISPOSE OF AS HE MAY THINK PROPER.
>
> "I also give and bequeath unto my son Benjamin L. Benson, the HOMESTEAD *where I now live, situated on the Harlem river.*" (See case, page 6, fol. 29.)

Then follows a second paragraph, giving a legacy to his grandchildren, in the following words:

> "SECONDLY, my will and intention is, that my son "Benjamin Benson do give unto my grandchildren, "AFTER *the decease of my wife*, the sum of fifteen hun- "dred dollars.
>
> "THIRDLY, the income of these legacies, and also of "my ESTATE, real and PERSONAL, I give unto my loving

" wife, Maria Benson, during her widowhood, TO DO AND " DISPOSE OF AS SHE MAY THINK PROPER."

The question presented by the case is, did Benjamin L. Benson take a fee or an estate for life, under the will, in the Homestead.

POINTS.

I. In examing the will of the testator it is important to determine in the first instance the rules of construction which have been adopted by the Courts, and then, being aided by these as by a lexicon in translating a foreign language, to spell out the intention of the testator. These rules are familiar to the Court and are stated here merely for convenience of reference, and not as points to be argued.

(*a.*) An heir at law is frequently said to be a favorite of the Courts. Ancestral pride, paternal love, and parental duty all conspire to impel the father of a family to make a suitable provision for his children and not to disinherit them, and our statutes make an equal and equitable division of the property of the father among his children.

(*b.*) A design to disinherit any one child of the testator, will not be presumed, and where it is claimed to exist, it must be clearly established beyond doubt or question. The presumption on the contrary is that the testator has discharged his duty, and provided by his will suitably for the wants of all who have claims upon his bounty.

II. The most important of these rules is thus expressed in the opinion of Mr. Justice Blackstone, in Perrin *vs.* Blake, Hargrave's Law Tracts, page 489, 490, " that the " intention of the testator shall be fully and punctually ob- " served *so far* as the same is consistent with established " rules of law and *no farther.*"

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III. When a man employs in a devise the self-same words used in the law to define an estate; when the law annexes particular ideas of property, to particular forms of expression, and a testator makes use of any of those technical modes of expression, it is evidence *prima facie*, that he means to express the self-same thing, which the law expresses by the self-same form of words.

4th Kent, 7th edition, page 597. Referring to Wigram on Extrinsic Evidence, "And the technical effect of words is presumed to be intended, if a different intention does not appear in the will."

Thus if a man devises his land being freehold, to another generally, without specifying the duration of his estate, the devisee shall be only a tenant for life.

4th Kent, 7th Ed., p. 598, 603, 604, 605, Doe exden, Sams vs. Garlick, 14 M. & Welsby, 696 Pollock, J. Sir James Mansfield, 5 Bos & Puller, 348. Sir Olando Bridgman, Collingwood vs. Pace, 410, p. 413.

"It is a familiar proposition that a testator is always presumed (per Gardner, J., Harvey *vs.* Olmstead, 1 Comst., 489,) *to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will, it appears he has used them in a different sense.*"

Wigram on Wills, vol. 2, p. 11, (Law Lib.)

"When a particular expression in a will has received a definite meaning by express adjudication, that meaning ought to be adhered to, for the sake of uniformity, and of security in the disposition of landed property."

4 Kent, 539, 540.

"No conjecture of a private imagination can shake a rule of law." Pr. Ld. Mansfield, in Loveacres vs. Blight Cowper, 352.

Per Cur in Lane *vs.* Stanhope, 6 T. E., 345, Lord Kenyon, Ch. J.: "It is our duty in construing a will TO GIVE "EFFECT TO THE DEVISOR'S INTENTION, *as far as we can consistently with the rules of the law;* NOT CONJECTURING, "*but expounding his will* from the words used." Per "Grose, J., "However in determining on the intent it is "necessary to see that THE WORDS USED are sufficient to "carry that intent into execution." *Again, per Kenyon, J.,* "Where certain words have obtained a precise technical "meaning, we ought not to give them a different mean- "ing, that would be, as Lord King and other Judges have "said, removing landmarks; but if there be no such ap-

"propriate meaning to the words used in a will; if the "devisor's intention be clear, and the words used be suf- "ficient to give effect to it, we ought to construe those "words so as to give effect to the intent, and not to doubt "on account of other cases which intend only to involve "the question in obscurity."

In Loveacres *vs.* Blight Cowper; see p. 354. 355, Lord Mansfield remarks: "The principles by which this case must be governed, are settled by analogy to established rules, respecting the limitation of estates by deed at common law. If a man, by deed of conveyance at common law, gives lands to another *generally, without words of limitation, the donee has only an estate for life.* But I really believe, that almost every case determined by this rule, as applied to a devise of lands in a will, has defeated the real intention of the testator. For common people, and even others who have some knowledge of the law, do not distinguish between a *bequest* of personality, and a *devise* of land or real estate. But, as they know when they give a man a horse, they give it to him for ever; so they think if they give a house or land, it will continue to be the sole property of the person to whom they have left it. *Notwithstanding this, where there are no words of limitation, the court must determine in the case of a devise affecting real estate, that the devisee has only an estate for life: Because the principle is fully settled and established, and* NO CONJECTURE OF A PRIVATE IMAGINATION CAN SHAKE A RULE OF LAW."

(*a.*) This passage is quoted entire to enable it to be stated once for all that, whether true or not, as it respects England, the opinion that the intention of the testator is defeated by construing it according to the rules of law, although it has been often reiterated here, has no application in this country. It would be difficult to find, I think, a man in the city of New York who did not know the ordinary rules regarding wills. The execution

of wills is required to be in an extremely technical form; and yet a will is rarely defective in this particular as may be seen from the paucity of reported cases.

(*b.*) But whether the remark be true or not in the general, it surely has no application to this particular will. It appears as if drawn by one who knew that the addition of words denoting an absolute power of disposal to every gift were requisite to give the fee or absolute property in the subject of gift, as if the testator had recently conversed with some lawyer or schoolmaster, who had advised him that such words were requisite.

IV. The rules of interpretation above mentioned in points 2 and 3 are very frequently stated in the volumes of reports, and the modes of expression adopted to define those rules of interpretation are almost identical with those in this brief. Yet it is evident that those rules must be taken with this qualification, that "if the intention of the testator *be clearly and manifestly* contrary to the legal import of the words of which he has made use, the technical rule of law shall give way to this *plain* intention of the testator."

Per Blackstone, J., in Perin *vs.* Blake, Har: L. Tracts, p. 495, 9 Hen., 6, 24.

V. But this intention of the testator, which is to ride over and control the legal operation of his own words, must be "*manifest and certain and not obscure or doubtful,*" as was resolved by all the judges of England in Wild's case, 6 Coke, 16. Or, according to the emphatic words of Lord Hobart, 33, "*the intent must not be conjectured but by declaration plain.*" Which words of Lord Hobart, as they are adopted and construed by Lord Hardwicke, in Garth *vs.* Baldwin, 2 Vesey, senr., 246, must mean "*plain expression or necessary implication of his intent.*" But if that intent be uncertain, if it be in suspense or doubt, then (he afterwards adds) *the legal opera-*

tion of the words must have effect. And Mr. Justice Blackstone, in Perin *vs.* Blake, deprecates a departure from the established rules of interpretation, *"without a moral certainty that the meaning of the testator requires it."*

Per Lord Mansfield, Loveacre *vs.* Blight, Cowper, p. 355.

"But if the intention of the testator is doubtful, the rule of law must take place. So if the Court *cannot find words in the will sufficient to carry a fee,* though they should themselves be satisfied beyond the possibility of a doubt, as to what the intention of the party was, they must adhere to the rule of law."

Moone *vs.* Heaseman, Willes, 141, Willes, L. C. J.

"But the rule is, that the intent of the testator *ought to appear plainly in the will itself, otherwise the heir shall not be disinherited.*"

VI. The rules of interpretation being thus stated, it is now proper to inquire—

1st. What is the legal and technical meaning of the words adopted in this devise?

2d. Is there any *"plain and manifest intention of the testator"* which can control and overrule by *implication* the legal effect of the words employed, and at the same time be consistent with the immutable rules of law?

VII. The words used by the testator in the devise in favor of his son Benjamin L. Benson are these, viz.:

"In the first place, I give and bequeath to my son, Benja-
"min L. Benson, *all that estate* now occupied by George
"Williams, *to do and dispose of as he may think proper.*

"*I also give and bequeath unto my son,* Benjamin L. Ben-
"son, *the homestead* where I now live, situated on the Harlem
"River.

"*Secondly.* My will and intention is, that my son, Benja-
"min L. Benson, do give unto my grandchildren, after the
"the decease of my wife, the sum of fifteen hundred dollars.
"*Thirdly.* The income of these legacies, and also of my
"estate, real and personal, I give unto my loving wife Maria
"Benson, during her widowhood, *to do and dispose of as she*
"*may think proper.*"

IX. The first clause of the will is expressed in language appropriate to devise the *fee simple.* The entire power of disposition is vested in the devisee, although not precisely, and takes, by express and appropriate technical language, a fee. While the language employed in the second clause is equally clear and definite, and imports a devise of a life estate in the homestead. Of this there can be no doubt. The words of gift to the wife are identical with those in the devise of the Williams' estate.

X. Is there anything in the third clause of the will beginning with the word "Secondly" which requires or even authorizes any different construction of the words employed in the devise of the homestead from that which the law gives to them? Is there any such overwhelming proof of a *testamentary intention* the converse of the plain, legal, grammatical signification of the words employed?

(*a*) The modes of expression adopted in the will are accurate and precise. Although the word "bequeath" is usually applied to personalty, yet it is legally sufficient to pass an estate in land.

(*b*) If the testator had designed to devise a fee in both the homestead and Williams' estate, would he not have embraced both in the first clause of the will, and have given a like power of disposition to the devisee over both pieces of ground?

As to "bequeath," see Harvey *vs.* Olmstead, 1

Comst., 482. Every word in a will must have its effect, if possible. Interpreting the words, "to do and dispose of as she may think proper," in the gift to the wife, as importing an absolute power of disposal, and absolute donation of the entire property, the same words in the devise of the Williams' estate must have the same signification. Why were those significant words omitted in the devise of the homestead, if this testator did not actually intend to devise an estate for life only?

(*c*) If he had not embraced the two pieces in one clause, and if he designed to devise the same estate in each, is it not natural to suppose that he would have adopted the same mode of expression in reference to both?

(*d*) These natural presumptions are very much strengthened by the studiously accurate language employed, which shows, what indeed the law would imply, that the will was drawn with great care and deliberation, with a studious effort to be accurate, by some gentleman who was [redacted] well acquainted with the rules of law, and that man must be presumed to have been the testator or the testator's legal adviser.

"Again, *it is not incumbent on the plaintiff to show,* by "an express evidence that his testator meant to adhere "to the rule of law; for that is always supposed until "the contrary is *clearly* proved; but it is incumbent on "the defendant to show by plain and manifest indica-"tions, that the testator intended to *deviate* from the "general rule; for that is never supposed, till made out, "*not by conjecture, but by strong and conclusive evidence;*"
Harg; Law Tracts, 504, opin. Mr. J. Blackstone in Perrin *v.* Blake.

XI. In view of the peculiar modes of expression adopted;

the marked constrasts in these modes of expression when applied to the two pieces of land, by one of which an estate in fee is clearly devised, and by the other of which a life estate is as clearly devised; it is plain that there is no room for implication. *Implication is only admissible where there is a doubt* (see 8th Point.) Where there is no doubt—where the expressions have a clear legal signification—then the law presumes that the testator understood the language employed, and meant what that very language expresses.

(*a*) Implication is "intendment or inference as distinguished from the actual expression of a thing in words." When it is expressed in words, there is no room for implication.

Burrill's Law Dicty., Implication.

(*b.*) "In general, where any implications are allowed, "they must be such as are *necessary* (or at least highly "probable) and not possible implications."

2 Bl'k. Com'y, 382.

(*c.*) "In construing a will, *conjecture must not be taken for "implication;* but necessary implication means not a "natural necessity, but SO STRONG A PROBABILITY OF "INTENTION *that an intention contrary to that which is "imputed to the testator cannot be supposed.*"

Lord Eldon, C. J., 1 Vez. and B., 466.
Wilkinson *vs.* Adams, see 3 Paige R., 1.
1 Jarman on Wills, 465. 431, Perkin's ed. *et seq.*
1 Roper on Legacies, 84, 724.

Roper in speaking of the exoneration of personal property, says:

(*d.*) "There must be in the will that which is sometimes "denominated '*evident demonstration,*' sometimes '*plain "intention*' and '*necessary implication,*' to operate that "exemption," (*i. e.*, exoneration of personal property.) "Thus much (adds Lord Eldon) can be collected from

"the cases; but when it is further inquired as to what it "is that constitutes this 'evident demonstration,' 'plain "intention,' or 'necessary implication,' it appears to me "that Lord Alvanly is right when he says *you are not "to rest on conjecture.* But the mind of the Judge must "be convinced that he is deciding ACCORDING TO WHAT "THE TESTATOR INTENDED."

1 Roper, 724
1 Roper, 698
Ambler, 33, 34
Morrow vs. Bush, 1 Cox, 185.

"The construction I have made (said Lord Hard- "wicke) is agreeable to the express words, *and no im- "plication can be to overrule them.*"

1 Roper, 698; Ambler, 33, 37.
Morrow *vs.* Bush, Cox, 185.

Gardner *vs.* Sheldon, Vaughan, 262–3. "*That the heir shall never be disinherited by a devise in the will by implication and not explicit, where the implication is only a possible implication and not a necessary implication.*"

"I mean by a possible implication, when it may be intended that the testator did purpose, and had an intention to devise his land to A; but it may also be as reasonably intended that he had no such purpose or intention to devise it to A."

(*e.*) And our own Court of Appeals has enunciated a doctrine equally emphatic and conclusive, viz: "*that tech- "nical words shall have their legal effect, unless from sub- "sequent inconsistent words it is* VERY CLEAR *that the "testator meant otherwise.*"

Jesson vs. Wight, 2 Bligh., 1.

"Monroe *vs.* Douglass, 1 Seld., 453; 2 Jarm., "Powell, 467 to 472."

See also 4 Kent's Com'y. 7 ed., p. 604, 605.

"Devises by implication are sustained only upon the principle of CARRYING INTO EFFECT THE INTENTION OF THE TESTATOR; AND UNLESS IT APPEARS ON AN EXAMINATION OF THE WHOLE WILL THAT SUCH MUST HAVE BEEN HIS INTENTION, THERE IS NO DEVISE BY IMPLICATION."

"An implication may be rebutted by a contrary implication which is equally strong."

Rathbone *vs.* Dyckman, 3 Paige R., 1.

The implication that a fee was intended by the testator when a charge is imposed on the person, is made merely to carry out the presumed intention of the testator not to thwart it. Here the intent of the testator not to give to B. L. Benson the absolute power of disposition over the homestead, which he had given him over the Williams estate, is so plain that there is no ground for implication. At the very least, it may be said that the implication that the testator intended to give but an estate for life in the homestead, is as strong as the implication that he intended to give a fee derivable from the charge; and if so, both implications fall to the ground, and the rule of law must prevail. Per Walworth Ch., 3 Paige, 1.

XII. "Nothing is better settled (says Jarman, 2 vol., "marg. p. 191,) than that a devise of messuages, lands, tene- "ments, or hereditaments (not estate) *without words of limit-* "*ation occurring in a will* which is not subject to the newly "enacted rules of testamentary construction, *confers on the* "*devisee an estate for life only* (*a*), notwithstanding the testator "may have commenced his will with a declaration of his in- "tention to dispose of his whole estate (*b*), or may have "given a nominal legacy to his heir (*c*), or may have declared "an intention wholly to disinherit him, or the will may con- "tain an antecedent devise to the heir for life of the testa- "tor's property, which is the subject of dispute (*d*); or the "devise in question may be to a class, embracing the heir as "to the testator's children (*e*); or, lastly, notwithstanding "there may be in another part of the will or in the immediate "be a devise thereof expressly for life affording the argument, "~~therefore~~, that the testator meant something more or at "least different, by an indefinite devise; (*f*) *though any*, or,

"*it is conceived, the whole of these circumstances concur in the "same will, it is indisputably clear that such a devise will con- "fer only an estate for life.*" Citing—

(*a.*) Taylor *vs.* Hodges, 3 Ch. Rep., 87; Deacon *v.* Marsh, Moore, 594; Bullock *v.* Bullock, 8 Vin. ab., 238, pl. 10; Roe d. Kirby *v.* Holmes, 2 Wil., 80 b; Doe d. Bowes *v.* Blackett, Cowp., 235; Doe d. Crutchfield *v.* Pearce, 1 Pri., 353.

(*b.*) Denn *v.* Gaskin, Cowp., 657, S. C. Douglass, 731; Doe d. Child *v.* Wright, 8 Dur. and E., 64; Doe & Small *v.* Allen, ib., 497.

(*c.*) Roe d. Callow *v.* Bolton, 2 Bl., 1045; Right *v.* Sidebotham, Douglas, 730; Roe d. Peter *v.* Daw, 3 Mav. & Selw., 518.

(*d.*) Awse *v.* Melhuish, 1 B. C. C., 519; Right d. Compton *v.* Compton, 9 East., 267.

(*e.*) Dicken *v.* Marshall, Cro. E., 330.

(*f.*) Goodlittle ex dem. Richards *v.* Edmonds, 7 Durn. & East., 633; Awse *v.* Melhuish, 1 B. C. C., 519; Doe d. Bristow *v.* Clark, 2 New Rep., 343; Doe d. Viner *v.* Eve, 5 Adolph & Ell., 317; Silvey *v* Howard, 6 Adolph & Ell., 253.

"There is almost an endless series of English authorities to this point, and the rule has been recognized in this country as of settled and binding obligation."

4 Kent, 535.

XIII. The proposition in the twelfth point has been modified so far as to establish the rule, that a fee will pass by necessity, where—

1st. The purpose of a trust the testator has created cannot certainly be performed; or,

2d. An act he has directed to be done cannot certainly or effectually be performed; or,

3d. A charge which he has created cannot be sustained, unless it be decided that a fee was devised. These implications are never made except when *indispensably requisite to sustain the devise*, and are, therefore, called *implications of necessity*.

Preston on Estates, vol, 2d, p. 231.

"That the rule may have application, the subject of pro-"perty must be devised to the person who is to take under "the will,

"1st. Generally: that is, without the limitation of any es-"tate, *or any declaration from which an intention to give a par-"ticular estate, must necessarily be implied; for, if it be* partic-"ularly expressed, *or must necessarily be implied from the lan-"guage of the devise,* OR FROM WORDS INTRODUCING ANOTHER "GIFT, THAT THE DEVISEE SHALL HAVE THE LAND, *or other "subject of property,* FOR A PARTICULAR TIME, *either for years, "for life, or in tail,* THIS RULE WILL NOT GOVERN THE CASE." Denn. vs. Slater, 5 Term Rep. 335. Bowers vs. Porter, 4 Pickering R. 198. Stevens vs. Winship, 1 Pickering 318.

Nay, even A DEVISE TO A MAN AND HIS HEIRS, AND ASSIGNS BY EXPRESS WORDS, SUBJECT TO A CHARGE, MAY BE REDUCED TO AN ESTATE-TAIL, by a clause which introduces another gift, to commence on his death without issue. Denn. vs. Slater. Brice vs. Smith, Willes 1.

And, if there be a devise to a person and the heirs of his body, chargeable with a sum of money payable by the devisee and his heirs, *this devise will give the fee.*

The word heirs will be referrable to the heirs entitled under the entail, and they are the heirs of the body. *Deo* v. *Fyldes* (Cowper, 835) is an authority for that conclusion. In that case, Lord *Mansfield* says, "That all the cases in which "the implication arising from the condition of paying money "was admitted, were cases where the question was, whether "the devisees took an estate for life or in fee, and not whether "they took an estate-tail or in fee?" And in Denn *v.* Slater, Cowp. 835.

5 Term Rep. 336. Lord *Kenyon*, referring to the case of Doe *v.* Fyldes, remarked, "That the law on this subject " was very accurately " stated by Lord *Mansfield*." The result of Lord *Mansfield's* statement of the law on this point is, that where an estate is given *generally*, without *adding words which would create a fee*, or an estate-tail, and it is charged with the payment of annuities, the devisee takes a fee; but that this was not the case where an estate-tail was given to the devisee. Nor can it be the case where an absolute fee is given, as in this case in the Williams' lot.

The object of the Courts in establishing the rule, was to comply with the presumable or supposed intention of the testator. *Of consequence, the application of the rule cannot be required when that intention is expressed by words of precise gift; leaving no doubt of the extent of interest which it is the intention of the testator to give*; or there are words negativing the construction which would entitle the devisees to an estate in fee. Therefore, in Doe *v.* Fyldes, Lord Mansfield observed "That there never " was an instance of such an implication where an *express* " estate for life, or an *express* estate-tail was given in *terms*, though it may be expressed by words of *desire*.

Reeves vs Gower. 11 Mod. 208; Ackland vs. Ackland, 2 Vern. 687; Doe. vs. Holmes, 8 Term. Rep. 1; Goodtitle v Madern 4 East. 496; supra.

2dly. The charge must be imposed, so that the person to whom the lands lands are devised may be called on for payment *immediately*, or at some FUTURE TIME, before he can possibly receive enough out of the profits of the property to pay the charge. It must be certain that he cannot if his estate in the land were to determine immediately.

3dly. In other words, a testator has no right, under pretense of doing a favor, to fix a devisee with an absolute obligation to pay, which, instead of conferring a benefit, would be imposing a liability, and thus making the condition of the devisee worse than if he had taken no gift. Nor will the Courts presume that he designed so to do, nor give such a construction to a will, unless its language expressly requires it, and precludes any other construction.

2 Preston on Estates, 241.

The circumstances of paying a sum of money or a legacy, is stated only for example. Suppose the devisee is, by the terms of the devise to him, either,

1st. To release a debt; or,

2d. To buy an estate for another; or,

3d. To relinquish a right which he has or claims in some other land, or to give up any other benefit,—

He will be equally entitled to an estate in fee, for otherwise he might be a loser.

An estate for life might determine before he could receive his money, or the value of his interest in the land. For this reason, the several cases are within a parity of reason, and require the like decision.

On the diversity taken in Collyer's case, the question under this rule is always whether, by the will under consideration, the devisee is, in point of intention, charged personally, or not personally charged; but in terms or in construction is charged only *for the profits* as they shall come to his hands.

Every case must depend very materially on its own circumstances; for it is on the penning of each respective will that the judges must determine whether the case falls within the one or the other of the distinctions. Cro. Jac.,427.

4thly. NOR UNDER THIS RULE WILL A FEE ARISE TO THE DEVISEE BY CONSTRUCTION, IF AN EXPRESS ESTATE IN TAIL FOR LIFE, OR FOR YEARS, BE LIMITED TO HIM.

In Dutton *vs.* Ingram the devise was to one son (John) and his heirs, on condition that he, as soon as the lands should come to him in possession, should grant to another son (Stephen) and his heirs an annual *rent of* £4 out of the said tenements, with a limitation over to Stephen, and the heirs of his body, if John died without heirs of his body. And it was ruled that John might grant a rent in fee simple (being according to the form of the gift,) and yet it was admitted he was only tenant in tail.

Bowen *vs.* Porter, 4 Pickering 198, 204.
Stevens *vs.* Winship, 1 Pickering, 318, 326.
2 Binn., 455.
2 W. & Searg., 142, 144.

5thly. A charge on the land, as distinguished from a charge on the person, would not entitle the devisee to the fee.

5 Term Rep., 562.

Hence the observation of Lord Kenyon: "Supposing the devisor had, in the beginning of the will, charged his debts and funeral expenses on his real estate, and had then, after a series of limitations, devised to his wife, in the words now used, viz, 'after payment of my just debts and funeral expenses,' it could not have been contended that such a charge on the real estate would have passed the fee to his wife; and if not, the place in which the same words are introduced cannot vary the question. I admit that the real estate is *charged* with the payment of debts and funeral expenses, if the personality be insufficient for that purpose; but there are no words charging the estate in the hands of the wife with the payment of these debts.

"This, therefore, essentially differs the present case from that of Doe *vs.* Richards; for there the debts were to be paid by the devisee, and were a charge on the estate in his hands; whereas, here, the debts are no charge on the devisee."

Doe d. Briscoe vs. Clarke and wife, 2 New Rep. 343.

6thly. So, if the charge of a sum of money, or of an annuity, be in a distinct clause, without any direction, express or by construction, that the devisee is to be personally liable to pay the legacy or the charge, a gift of the fee would not be implied from this charge.

An inaccuracy sometimes occurs in expressing this distinction. In Hapwell *vs.* Ackland, Salk., 239, Doe *vs.* Holmes, 8 T. R., 1, Doe, *ex dem.* Stephens *vs.* Snelling, 5 East, 87, as well Doe *vs.* Richards, the legacies are strictly made payable "out of" the land, or "thereout." See observations of Lord Lyndhurst, in Doe, *ex d-m.* Clark *vs.* Clark, 3 Tyr. R., 120. They are all overruled in England and in this country.

Mesick *vs.* New, 3 Selden, 170.
Doe, *ex dem.* Meller *vs.* Denn., 2 Bos. & Pall., 252–'3.

Every devisee, as owner, will be liable to pay the charges imposed on the land; and he, though personally charged, will not be liable to any greater extent than the value of the property he has received.

7thly. THE IMPLICATION OF THE FEE DOES NOT ARISE FROM THE MERE CHARGE, OR FROM SUCH LIABILITY TO PAY THE CHARGE. It arises when, in terms or by sound construction, there is a direction that he should pay without restricting the payment to be out of the rents and profits, for from this direction, the law which could not relieve the devisee after he had paid, though he died before repayment, would intend, from the charge, that the devisee was to have the fee.

8thly. *Besides, at the period when the rule was originally adopted, gifts of this description were, as Lord Mansfield has shown, considered to be on condition,* so that there was an obligation to pay as the means of preserving the estate from the operation of the condition; while in modern times, the doctrine of conditions is deemed inapplicable, and equity administers relief by enforcing the charge (ma.) 2 Lev., 249.

Also, if the gift be subordinate to the charge, as a prior encumbrance, without special direction concerning the devisee as the person by whom it is to be paid, the fee will not pass.

Thus in Dickens *v.* Marshal, the devise was of all the devisor's lands and goods, after his debts and legacies are paid. Croke El. 330 Moseley 240.

In Canning *v.* Canning, the devise was of all the rest, residue and remainder of the devisor's messuages, lands, tenements or hereditaments, after his just debts, legacies, and funeral expenses shall be fully paid and satisfied.

And in Denn. d. Moor *v.* Mellor, the devise was of the residue of, &c., after payment of debts, &c., and the fee did not pass. 5 Term. Rep 558

2 Atkin, 341. And in Merson *v.* Blackmore, the gift was of all his lands, &c., after debts and legacies are paid, and funeral expenses are discharged; and was preceded by an introductory clause, intimating an intention to dispose of all wordly goods whatever. Lord Ellenborough observed "The debts, &c., were not a charge on the executrix, residuary legatee, devisee, &c., because the devisee was to have the estate only after these charges were satisfied. And the decisions depend on the distinction that where the devise is only *after* payment of debts, there the charge is upon the land, and the devisee himself takes nothing till after that charge is satisfied; but where the devisee himself is charged with the payment of the debts, there he must take the fee in the estate in respect of which he is so charged."

4 East, 499.

4 East, 500.

Also on a gift to A, and B, except £20, to be paid out of E's part of the lands, the devisees took an estate for life only, "because this sum was not a charge upon the estate in the hands of the devisee, but a charge antecedent to the devise; not a devise upon condition of paying."

Roe. vs. Daw, 3 Man and Selw., 518.

It must not, however, be forgotten, that the fee may pass by other words in the will, although the gift be after payment of debts, legacies, and funeral expenses.

Gully vs. Bishop of Exeter, 4 Bing. 290.

The following observations of eminent Judges are added, as elucidating this class of cases:

In Denn ex dem. Moore *vs.* Mellor, Lord Kenyon observed: "This case has been compared to that of Doe *vs.* Richards; but," he added, "there the words were, 'my legacies and funeral expenses being THEREOUT paid,' which imported that those sums were to be paid by the devisee, out of the interest given to her; and if she died immediately after the devisor, and had only taken a LIFE ESTATE, the fund out of which she was to bear those charges might have failed; we were therefore compelled to make that decision, and I am perfectly satisfied with it."

8 East. 141. Denn ex Dem Moore vs. Mellor, 5 Term. Rep. 562.

Peppercorn vs. Peacock, 3 Man. and Gr. 1021, T. T. 1841, C. P.

And in Goodtitle *vs.* Maddern, Lord Ellenborough observed, "She cannot have less than a fee in it; because she is empowered to sell it; which she cannot do without having the fee." Goodtitle vs. Maddern, 4 East. R. 499.

The language of the devise, in that case, is stated in a former page.

(*a.*) "The rule under consideration, (*i. e.*, in regard to a "charge on the person,) however, *is confined to indefinite* "*devises*, FOR WHERE the direction to pay is imposed on "a person to whom there is given AN EXPRESS ESTATE "FOR LIFE OR AN ESTATE-TAIL, WHETHER LIMITED IN "EXPRESS TERMS, OR ARISING CONSTRUCTIVELY BY IM- "PLICATION FROM WORDS, INTRODUCING THE DEVISE "OVER THE CHARGE IS INOPERATIVE TO ENLARGE SUCH "(*a.*) ESTATE FOR LIFE OR ESTATE-TAIL TO A FEE SIMPLE." Goodtitle vs. Edmonds, 7 Durn. & East. 635; Willis vs. Lucase, 1 P. W., 474. Denn vs. Slater, 5 D. & E. 535; Doe vs. Owens, 1 B. & A. 318. Doe ex Dem. Sands vs. Garlick, 14 M. & W., 698

2 Jarman on Wills, marg. p. 172, 173.
2 Perkins Jarman, p. 126, 127.

(*b.*) The rule referred to is, that where there is a charge of a sum in gross *on the person of the devisee in respect of the very land devised,* then an implication arises that the devisor intended to cast a fee upon the devisee, if the language of the will, other than that relating to the charge, leave the estate to be created *in doubt.* Mesick vs. New, 3 Selden's N. Y. Rep., 170, 173.

(*c.*) It does not apply to this case, because the *implication* that a fee was intended to be devised, *is supplied and exhausted* by the devise of a *fee* in the Williams lot. Because this implication is never made except "to supply the intent of the devisor." Burlingame vs. Belden, 21 Wend. R, 463.

Mary Portington's case, 10 Co., 41, a.

(*d.*) It is an implication made by the law in case of absolute *necessity,* and where there is *doubt,* upon the other clauses in the will to protect the devisee, but it is never Harvey vs. Olmstead, 1 Comstock, 490, Olmstead vs. Olmstead, 4 Comstock, N. Y. R., 56.

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2 Jarman on Wills, marg. p. 172, 173.
2 Perkins Jarman, p. 126, 127.

(*b.*) The rule referred to is, that where there is a charge of a sum in gross *on the person of the devisee in respect of the very land devised,* then an implication arises that the devisor intended to cast a fee upon the devisee, if the language of the will, other than that relating to the charge, leave the estate to be created *in doubt.* Mesick vs. New, 3 Selden's N. Y. Rep., 170, 173.

(*c.*) It does not apply to this case, because the *implication* that a fee was intended to be devised, *is supplied and exhausted* by the devise of a *fee* in the Williams lot. Because this implication is never made except "to supply the intent of the devisor." Burlingame vs. Belden, 21 Wend. R, 463.

Mary Portington's case, 10 Co., 41, a.

(*d.*) It is an implication made by the law in case of absolute *necessity,* and where there is *doubt,* upon the other clauses in the will to protect the devisee, but it is never Harvey vs. Olmstead, 1 Comstock, 490, Olmstead vs. Olmstead, 4 Comstock, N. Y. R., 56.

indulged except upon the supposed idea of *necessity*. Here there is no *necessity* for such such an *implication*. "It is, however, not enough for our judgment, "*that "that the construction is doubtful; for, in order to make a devise "of lands, without any limitation added, a fee, such an intention "must appear on the face of the will to satisfy the conscience of "the Court. If it is barely problematical, the rule of law must take place.*"

Roe *vs.* Blackett, Cowper, 235.

(*e.*) This implication is never made except where

1st. "It is necessary." 2 Preston on Est., 231, and all the authorities.

2d. Where it is in accordance "with the presumed intent of the testator." Harvey vs. Olmstead, 1 Comstock, 490.

3d. Where the charge is in immediate connection with the devise. Burlingame vs. Belden, 21 Wendell, 461.

4th. When the Court can see that the charge is imposed "*on account of the devise.*" Per Gardiner, J., Harvey vs. Olmstead, 1 Comstock, 490.

5th. "Where it exists, it takes from the devise the character of a gift, and turns it into a purchase." Per Gardiner, J., 1 Comstock, 490.

6th. "It is on the ground of an understood condition that the principle rests." Per Anderson, Baron, Doe vs. Garlick, 14 M. and W., 704. That is to say, that the devisee take an estate in fee, in the lands devised, on condition of paying the legacy.

7th. The rule that a personal charge implies a fee, is merely a rule of natural implication, adopted as a supposed indication of the testator's intention; it is

applied only where no limitation is expressed, and where there is no clear evidence that only a life estate was intended, and it will not prevail against an intention to the contrary, apparent in other parts of the will. Bowers vs. Porter, 4 Pick'g, 198, 204. Lessee of Willis vs. Bucher, 2 Binn, 455, 464. Dixon vs. Ramage, 2 W. & S., 142, 144. Thus, if a devise is expressly for life, it is only a life estate, though the person of the devisee may be charged. Stevens and ux. vs. Winship and ux., 1 Pickering, 318, 326. Doe vs. Fyldes, Cowper, 835, approved Lord Kenyon, in Dunn vs. Slater, 5 Term R., 336.

8th. It is very clear from the case of Burlingame vs. Belden, 21 Wend., 463, that if any other fund is created by the will, to which the charge may be referred, as where personal property is also given to the devisee, the implication will not arise, it will the rather be supposed that the testator designed to connect it with the personal fund.

In Spraker vs. Van Alstyne, 18 Wendell, 200, the testator devised as follows: "Item—I give and devise unto my "son Martin, &c., that piece or lot of land, lying, &c.;" and ***"he directed that all his just debts should be paid by his sons Martin "and Cornelius."***

Martin and Cornelius actually paid one debt of £231, and another of $70; as the testator died in 1791 or 1792, it may be that these debts amounted to the full value of the land.

The Supreme Court (13 Wend., 582,) decided that a fee was not devised, but the Court for the Correction of Errors reversed the judgment. (18 Wend., 200.) 13 Wend. 582. 18 Wend. 200.

In this case there was the additional circumstance that the testator had declared that the eldest son should have thirty shillings by reason of his primogeniture, and "that he "shall be contented with what is hereafter given him,"

thus, as the Court thought, definitely showing his *intention that the heir should not take; and as he made no devise of the reversion,* the Court held (per Chan., 207) *that that circumstance was alone sufficient to convey a fee in the lands dvised.*

It was so held, declares the Chan. in Butler vs. Little, 3 Greenleaf, 293.—*It is very evident that upon this alone the Court would have declared the estate devised to be a fee;* and without this circustance, and had the case stood alone upon the implication, it is reasonable to infer that the Court would scarcely have pronounced in favor of a fee.

In Fox vs. Phelps, it was abundantly evident *from the declaration of an intention to devise the whole estate of the testatrix,* in the beginning of the will, that she designed to give to Henry and Isaac Thorne *a fee; and so both the Supreme Court* (7 Wend., 398) *and the Court for the Correction of Errors* (20 Wend., 437) *held,* and other clauses in the will made this very evident, for they were to have the estate valued when the daughter Abigail should attain her majority or marry, and it could hardly be supposed that the textatrix intended that they should pay the one-half away and then *divide the whole into four parts,* taking only two, which would be leaving them as if they had taken nothing by the will.

It was not, therefore, necessary to decide whether the charge cast a fee by implication.

In Harvey vs. Olmstead, 1 Comst., 483, the Court of Appeals adhered strictly to the rules of sound law.

"The devise was in these words:

"*I give and bequeath* to my son, Nathaniel Olmstead, "junior, *the lot of land* that I purchased of Jacob Powers, "*containing fifty acres* or more, and he, the said Nathaniel, "*to come into possession of the same immediately after my de-*"*cease.*"

"I also give and bequeath to my son, Nathaniel Olmstead "junior, the mountain lot of land, (so called,) containing "about fifty acres, and the said Nathaniel to come into pos-"session of the same immediately after my decease."

And he afterwards provided that, if his personal estate should not be sufficient to pay a legacy of $1,000 to Joseph Washburn Olmstead, then that it should be paid "*in lands "from the mountain lot, so called.*"

Notwithstanding the very strong words of this devise, accompanied by the declaration in the beginning of the will, that "*I order and direct that my real and personal estate be divided and "distributed* as hereinafter described," the Court held that Nathaniel *did not take a fee* in either the mountain or Power's lot.

Harvey vs. Olmstead, 1 Comstock, per Gardner J., 483, 489.

Rule of Construction.

"*According to the terms of the devise, Nathaniel Olmstead, senior, "took a life estate only in the mountain lot. Such was the established "construction, at the making of this will, of a devise of real estate "containing no words of limitation.* (6 Term. Rep., 610; 2 Pres- "ton on estates, 188; 20 Wend., 580.) *It is a familiar proposition "that a testator is always presumed to use the words, in which he ex- "presses himself, according to their strict and primary acceptation, un- "less from the context of the will it appears he has used them in a "different sense.*"

(Wigram on Wills, Law Lib., vol. 2, p. 11.)

"The words of this devise, as we have said, import an in- "tent of the testator to grant a life estate only in the pre- "mises in question, *but it is claimed* that the context *en- "larges the estate to a fee,* by showing that such must have "been the intention of the testator.

P. 488.

"*We are referred* to the second clause, by which the testa- "tor 'orders and directs that his real and personal estate be "divided and distributed as follows:' This clause is obvious- "ly introductory to the actual distribution afterwards made "by the decedent. *It indicates an intention to dispose of his "property real and personal, but this is not enough.* THERE "MUST BE AN INTENT AND WORDS OF DISPOSITION. *Both "must concur in every valid devise.* (Sanderson *vs.* Dobson, "decided in 1847, in Exch. Law Jour., 249; Doe *vs.* Earle, "id., 242.) The clause cannot embrace all the subsequent

1 Excheq. 141 16 Law J., Ex. 241, 10 Beavan, 478. 7 C. B., 81.

"devises of real property, because a portion is devised to "the wife of the testator during her widowhood."

"Nor are the introductory words necessarily connected "with the disposition of other portions of his real estate to "his sons. The estate of the testator in his real property "was as much the subject of division as the lands themselves. "If he had given a particular tract or farm to one of his sons, "and made no disposition of the residue, it would not be "pretended that we could extend the gift to other lands "however emphatically the testator should announce his in- "tention to settle all his property by his will. This remark "is applicable to the devise in question."

Page 490. 3 paragraph. "*The testator has used language which, according to an unbroken* "*series of decisions, import an intent to give an estate for life. Such* "*is his disposition.*

To use the language of the introductory clause, he has "divided and distributed" such an interest, and no other, "to each of his sons. If the residue of his estate is undis- "posed of, it presents the ordinary case of a general inten- "tion not executed, *but it furnishes no reason for departing* "*from the language of the testator, nor any authority to this Court in* "*his place to distribute his property for him.* (Barheydt *vs.* Bar- "heydt, 20 Wend., 580, 581.)

Charge of $1,000. Page 490.—"There is no foundation for saying that Na- "thaniel took a fee in consequence of the legacy of $1,000, "being a charge *upon him in respect to the lands devised to him* "*by the testator,* (a.) *A charge to create a fee by implication* "*must be upon the person of the devisee in respect to the lands* "*devised. Where it exists, it takes from the devise the charac-* "*ter of a gift, and turns it into a purchase. The mode of com-* "*pensation prescribed by the testator may be by the payment of* "*debts or legacies, or by the relinquishment of a right.*"

"TO GUARD THE DEVISEE UNDER SUCH CISCUMSTANCES "AGAINST LOSS, ACCORDING TO THE PRESUMED INTENT OF "THE TESTATOR, THE ESTATE IS TURNED INTO A FEE. (Spra- "ker *vs.* Van Alstyne, 18 Wend., 205, and cases cited;

"Jackson *vs.* Bull, 10 John., 143.) In this case, the legacy "to Joseph W. Olmstead is made a charge upon the person- "al estate, and that failing, upon the Powers lot. At most, "the charge upon this land is contingent. There is no obli- "gation imposed upon Nathaniel in respect to the devise to "him of the mountain lot, on the contrary, in default of per- "sonal property, the legacy is to be paid in land other than "the premises in question, to be appraised by the executors. "(20 Wend., 582, and cases cited, 8 John. R., 142; 18 "Wend., 205, and cases cited.) We think, therefore, that "the decision of the Supreme Court should be affirmed."

In this case the Court distinguished between the two lots.

Per Gardner, J.

"*Most* of the questions arising in this cause were presented "and determined in Harvey *vs.* Olmstead, 1 Comst., 483, in "a case involving the construction of the same will. We "adhere to that decision; and the matters then adjudicated "will not now be reconsidered. It is, however, claimed "that the devise of the Powers lot to Nathaniel Olmstead, "jr., without words of limitation, charged with a legacy of "$1,000 to Joseph Washington Olmstead, (in case the testa- "tor's personal estate should be insufficient for its payment) "*vested a fee in the devisee,* by implication. The determina- "tion of this question was not necessarily involved in the "previous decision, and will now be examined.

Olmstead vs. Olmstead, 4 Comstock, p. 56.

Charge of $1,000.

"And 1st. THE LAW NEVER ENLARGES AN ESTATE BY IM- "PLICATION, UNLESS THE DEVISE IMPOSES A CHARGE UPON "THE DEVISEE, IN RESPECT OF THE LANDS DEVISED. WHEN "THIS IS DONE, AS WAS REMARKED IN THE FORMER CASES, IT "TAKES FROM THE DEVISEE THE CHARACTER OF A GIFT, AND "TURNS IT INTO A PURCHASE. If there was doubt as to the "correctness of this principle, it is removed by the cases to "which we have been referred by the plaintiff. In Doe *vs.* "Richards, (3 Term Rep., 356) after a previous devise of "leasehold property, the testator devised all the rest, residue

Rule.

"and remainder of his lands and tenements, and *hereditaments* and personal estate whatsoever, his *legacies and funeral expenses* being *thereout paid* to his sister, and constituted her his sole *residuary* legatee. It was held that the devisee took a fee. But it was distinctly admitted that neither the terms *'rest and residue,'* following the devise of a partial interest in lands, nor the words 'hereditaments,' nor the circumstance that she was the sole residuary legatee, any or all of them, were sufficient to convey a fee. In all these respects, that will was much stronger for the devisee than the one under consideration. But the decision was placed exclusively upon the clause providing for the payment of legacies and funeral expenses. The expression 'my legacies and funeral expenses being thereout paid,' imposed a condition which qualified the whole devise over. That condition was, that all the legacies, &c., should be paid absolutely out of the property. The devisee, by the acceptance of the devise, admitted the sufficiency of the fund, and assumed the performance of the condition as a personal duty, irrespective of the amount he might ultimately realize. Accordingly, Ashurst, J., remarked, that if the words had been 'paying all my funeral expenses and legacies out of the rents and profits,' they would not convey a fee; *because the devisee would only be liable to pay out of that particular fund, and could not be injured.* But according to the words of this devise, all the *legatees* may call upon the *devisee* for their demands, and she must take a fee to give her wherewithal to pay them.

"*Denn ex dem., Moor vs, Miller,* (5 *T. R.*, 588) is another of the cases to which we are referred.

"There the testator, after disposing of a copyhold mes-suage, devised 'all the rest of his lands, tenements, and hereditaments, and also all his goods, *after* payment of his just debts and funeral *expenses.*' Held that the devisee took an estate for life only."

"Lord Kenyon distinguished the case from Doe *v.* Rich-

"ards, *supra*. There he remarked the debts were to be paid "by the devisee, and were a charge on the estate in his hands. "*Whereas here the debts, though charged on the estate, are no charge* "*on the devisee.*

"Jackson *vs.* Bull, (10 John., 151;) Heard *vs.* Horton, (1 "Denio, 160;) Spraker *vs.* Van Alstyne, (18 Wend., 200;) "*all assert the doctrine that there must be a charge upon the person of* "*the devisee in respect to the land, in order to create a fee by implica-* "*tion, and that a charge upon the estate is not within the reason of* "*the rule.* A charge upon the person arises in the language "of the Chancellor in Spraker *vs.* Van Alstyne, 'where the "devisee is directed to pay debts or legacies personally, or "to relinquish some right, *on account of the devise*, so that, by "acceptance of it, he impliedly assumes to pay the charge, "or submit to the loss.

Rule again stated.

"There is no force in the distinction between a devise of "an estate, after payment of a legacy, and a direct devise of "the land, with a provision that the legacy should be raised "out of it; in neither case is the devisee personally liable, "and in both he takes as a mere gift the residuum after pay- "ment of the charge. The distinction is supposed to be "warranted by Doe *vs.* Richards, *supra*, and Doe *vs.* Snelling, "(5 East., 87.) It is not necessary to question those decisions "in this case, but it is proper to remark that they have been "doubted, both in England and in this country. (Doe *vs.* "Clark, 2 Bos. & Pul., 349, 350; Jackson *vs.* Bull, 10 John., "153.) And in Van Alstyne *vs.* Spraker, (*sup.*) *it was dis-* "*tinctly asserted, that where the devisee was to pay out of the rents* "*and profits, or out of the property, his estate would not be enlarged* "*by implication.*

Page 60.

Remarks on Doe vs. Richard & Doe vs. Sneiling, which are overruled.

"The authorities cited by the plaintiff show the correct- "ness of the judgment of the Supreme Court, and it must be "affirmed."

See all the modern cases collected in 6 Cruise by Greenleaf, Tit. XXXVIII, Ch. XI, § 60 to 83, and cases cited in notes.

4 Kent, sec. 58, p. 540, and notes.

XIII. To resume—

(1.) No implication is indulged except when necessary.

(2.) This is not a necessary implication.

(*a.*) The words are explicit, or at least sufficient to authorize the presumption that the testator intended to give a life estate only.

(*b.*) The heir is never disinherited, except by words strictly requiring it.

(*c.*) There are no doubts here to be solved by *implication* or *conjecture.*

(3.) The Court cannot see that the devisee will be a loser in any event. All the cases *show that the implication* will not be indulged, except where the Court can see to a certainty, that the devisee may be a loser by the sudden termination of the life estate before enjoyment.

As to construction. 4 Kent, 535, 536, 537.

Hobart's Rep., Amer. ed., edited by Sergeant Williams, pages 3 and 7.

3rd volume of the Digest of the Laws of Real Property, by Judge Lomax of Virginia.

This implication is never indulged, except to guard the devisee against the possibility of loss. For as it is impossible to state with certainty that a devisee will live more than a single day, and in such an event he would be a loser if the entire estate were one for life only, however small the charge might be, the Court, "to guard the devisee, under such circumstances, against loss, *according to the presumed intent of the testator, the estate is turned into a fee.*"

Per Gardner, J., in Harvey *vs.* Olmstead, 1 Comstock, 490.

Such is the uniform language of all the cases, and is the one only great reason given by the Court from Collyer's case, 6 Coke, 15, b. to the present time.

This possibility of loss is, it is true, in many of the cases very remote and contingent, *but its existence is always treated as necessary, to give rise to this implication*, which is resorted to only from necessity.

That *necessity* does not exist in this case.

The devise of the Williams lot precludes the possibility of loss, or at least it is impossible to say that there will be a loss to the devisee, and therefore no such implication of an intent to devise a fee can arise, in respect to the homestead. Besides, the legacies were not to be paid until after the death of the widow, and then the devisee would have the Williams estate not only, but one half of the personal also, which is not disposed of by the will. The value of the personalty is not known, but may be supposed to be large, as the income of the realty and personalty was deemed by the testator to be ample for the support of his wife.

(4.) Where the reason of the rule ceases the rule itself ceases.

See Boroston's case, 3 Coke, 20, 21, a. and b.; and notes Q and R to Thomas & Frazer's Ed., and also note 2, Agar *vs.* Poole, Dyer, 371.

XIV. Where personal property is specifically bequeathed to the devisee, although it be of uncertain value, in the same will in which the lands are devised without words of perpetuity, no implication will be made, that the testator designed to give an estate in fee.—See Barlinghame *vs.* Belden, 21 Wendell, 463.

Now here it is as plain that Benjamin L. Benson will take one half of the personalty under our statutes of distribution as if it had been specifically bequeathed in the will. Is it not then as clear that the implication should not be made? Had the gift of personalty been expressed in the will the implication would not have been made.

But the devisee takes the pesonalty *by as good a title* as if it had been bequeathed to him. The reason of the rule is, that the personalty is supposed to be sufficient in amount to pay the charge, or at the least it cannot be affirmed that it is insufficient. That reason applies to this case with precisely the same force as if the gift had been expressed in the will. Shall it not be applied? Shall we say that if the personalty had been given by one form of gift that it would have been

of greater or less value than if given by any other form of gift? In each case he receives the property, and if it be sufficient to satisfy the charge it should relieve the devisee of the realty from all implication arising from supposed possibility of loss. In either case the result is the same as it would have been if he took the personalty under a will making a specific bequest. That there was personalty of Laurence Benson, and that it was of *considerable* value, is certain, as that appears from the clause of the will by which the income of the *personalty* and of the realty is designated as the fund set apart for the support of the widow.

Now we all know that persons moving in the testator's sphere of life in the city of New York require a considerable sum for their annual support; nor would a testator in any of our old families leave his widow without providing an income of thousands of dollars per annum. It is more than probable that Mrs. Benson's annual income amounted to $10,000 per year.

At least it can be ascertained; allow us to prove it on another trial. There are living witnesses who can prove its value. Let us have another trial and ascertain the value of the Williams lot, if necessary, and the value of the personalty. These extrinsic facts and all the facts which surrounded the testator when the will was made, are according to the rules laid down by Wigram in his work on Extrinsic Evidence admissable.—See 5th Proposition, p. 12.

XV. If, in conclusion, we are to judge by implication, we must suppose the testator destitute of the common sympathies and affections of humanity; we must suppose him destitute of natural feeling; we must suppose him to have been guilty of the grossest injustice, if we believe he really designed thus to enrich a son, with an almost princely fortune, while he leaves three infant grandchildren with the merest pittance. The character of the devisor we must assume was gentle and humane, as he was reputable and honest. Can we suppose that such a man would have designed to give directly or by implication the whole of his vast estate to one only, whilst leaving three granddaughters without the aid of any portion of his valuable landed estate.

Does any one suppose that he would have made a will so cruel and so unnatural?

In this country, where the law of primogeniture does not prevail, each child claims and possesses an equal right to a parent's property, and is supposed to have like claims upon

the bounty of a testator; and this claim is more especially recognized and admitted to the "homestead," the home which cherished our helpless infancy, protected us in our youth; to which our earliest and holiest memories cling, and where every member of the family, however unfortunate elsewhere, expects always to find a welcome when he returns and, in in a word, (the most forcible word in the language,) a "home" at every period of his life; it is the one place where all that is dearest to man is concentrated.

Shall such a construction be given to this will as will convict the testator of a deliberate design not only to disinherit his orphan granddaughters, but to direct his son and heir to retain the purchased estate, (the William's lot,) whilst he is, at the same time, instructed to sell the "HOMESTEAD"—a homestead now estimated to be worth half a million of dollars—to pay a paltry charge upon the person of the devisee. That these are appropriate considerations to be addressed to the Court the cases abundantly show.

In the case of French *vs.* McIlHenny, 2 Binney, Chs. J. Tilghman says: "I think the principle of not disinheriting the heir without sufficient words ought, if possible, to be more strictly observed here than in England, because there the *eldest* son is the heir-at law; but here the law is more equitable, and *all the children together* are considered as heirs."

In Thellusson's case, Mr. Hargrave's argument consisted chiefly in pointed denunciation of the injustice of the provisions, implying a total absence of natural affection as well as reasons to show that it was against the policy of the law, and that it tended to create a perpetuity.

And the law should presume, as a rule of evidence as well as a rule of construction, that a testator designed, *prima facie*, not to outrage the common sympathies of humanity by leaving any of those having claims on his bounty quasi paupers, but rather that he designed to make a just and equitable provision for all his heirs.

The construction put on the will by the plaintiff's counsel presumes that he designed to retain the homestead for the whole family, while a contrary construction implies that he designed to disinherit the granddaughters.

XVII. The parol evidence offered on the trial was clearly admissable if the 5th proposition of Wigram is correct in Wigram on Extrinsic Evidence.

It is in these words: "5th. For the purpose of determining

the object of a testator's bounty or *the quantity of interest to be given* by his will, a court *may inquire into every material fact* relating to the person who claims to be interested and *to the property so claimed*, as the subject of disposition, and to the circumstances of the testator and his family affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, *or to determine the quantity of interest he is to take by the will.*"

XVIII. The presumption or implication that the testator designed to give a fee because he imposed a charge, is a presumption of fact, not of law; anything, therefore, which goes to raise a contrary presumption of fact may be shown. In other words, presumptions of fact depend upon oral evidence, and may be changed by changing the facts from which they are deduced.

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